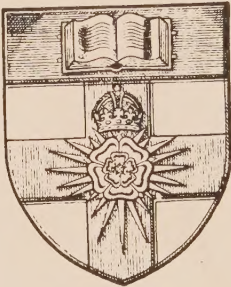


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AND





JUDGE  
OF  
THE HIGH COURT OF ADMIRALTY  
AND  
THE ECCLESIASTICAL COURTS,  
XXXI & XXXII VICTORIA.

---

Sir ROBERT PHILLIMORE, Knt., D.C.L.

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# CASES

DETERMINED BY THE

## HIGH COURT OF ADMIRALTY

AND BY THE

## ECCLESIASTICAL COURTS,

FROM

MICHAELMAS TERM TO TRINITY TERM,

XXXI VICTORIA.

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THE JEFF DAVIS.

*Garnishee Order—Proctor's Lien for Costs—Priority.*

A proctor's lien on a fund in Court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the holder of the garnishee order.

THIS was a cause of wages instituted by Captain Collingridge, the master of the *Jeff Davis*, against the vessel. Appearances were entered by Richard Phillpott and William Stansfield Broadbent, mortgagees of the vessel in possession, and William Cartwright her owner; and the vessel was subsequently sold at the instance of the mortgagees, and the sum of 669*l.* 6*s.* 4*d.*, the proceeds of the sale, was brought into the registry, out of which the judge directed the sum of 105*l.* 6*s.* 11*d.*, the amount claimed for wages, to be paid to Messrs. Toller, the proctors for the master.

A judgment had been recovered in the Court of Exchequer against the master by Robert Brown for the sum of 228*l.* and

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3d & 8. 509  
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60*l.* 19*s.* 10*d.* costs, and a caveat had been entered in the registry of this court against the payment of any sum that might be due to the master in respect of his wages. An order nisi attaching the sum of 105*l.* 6*s.* 11*d.* was obtained on behalf of Brown, and served upon the registrar of this court. A copy was also sent to the proctors for the master, who did not attend at the hearing of the rule nisi, and the garnishee order was made absolute.

*Pritchard* moved that the sum due to the master be paid out to the attorneys for Brown in obedience to the garnishee order, and submitted that the proctors for the master had waived their lien for costs upon the fund; and that this Court could not review the order of the Common Law Court: *The Olive*. (1)

*Clarkson*, for Messrs. Toller, referred to the 23 & 24 Vict. c. 127, s. 28; *The Philippine* (2); *The Soblomsten*. (3) The proctor has always been entitled to his costs under these circumstances. Whatever be the rights of Mr. Brown under the garnishee order they cannot affect the proctor's prior claim.

SIR ROBERT PHILLIMORE. I have looked at the case of *The Olive* (1), quoted to shew that this Court could not recognize a proctor's lien after a garnishee order. But I think that the decision in *The Olive* does not govern the present case. I conceive that, independently of the statute (23 & 24 Vict. c. 127, s. 28), the Court has power to direct the registrar to satisfy the proctor's lien. I shall therefore make an order for the prior payment, out of the fund in court, of Messrs. Toller's taxed costs; the residue to be paid to Mr. Brown.

*Motion refused without costs.*

Attorneys for Robert Brown: *Wilkins, Blyth, & Marsland*.

Proctors for Captain Collingridge: *Toller & Sons*.

(1) Swab. 423. (2) Law Rep. 1 Adm. 309. (3) Law Rep. 1 Adm. 293.

*5 p.m. 445*

## THE HALLEY.

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*Collision between a British and a Foreign Vessel in Foreign Waters—Compulsory Pilotage—Pleading.*

The plaintiffs, owners of a foreign vessel, claimed damages for a collision between their vessel and an English ship in Belgian waters. The defendants, the owners of the English ship, pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred :—

*Held*, that the plaintiffs were entitled to plead in reply, that, by the same laws, the owner of the wrong-doing vessel, although compelled to take a pilot on board, continued liable for the damages.

The expediency of the law of compulsory pilotage, so far as it exempts the owner of the wrong-doing vessel from all liability, considered and questioned.

*Revised by P.C. 2 R. 193.*

THIS case came before the Court on a motion by the defendants to strike out the 3rd article of the plaintiffs' reply.

The petition of the plaintiffs set forth that the Norwegian barque *Napoleon*, of the burthen of 740 tons, while riding at anchor in Flushing Roads in the month of January last, was run into by the British steam-ship *Halley*, and thereby suffered considerable damage.

The defendants, the owners of the *Halley*, pleaded, in the 11th article of their answer, "that by the Belgian and Dutch laws which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the river pilot came on board the *Halley*, and thence up to and beyond the place of the collision, it was compulsory on the steamer to take on board and to be navigated under the directions and in charge of a pilot, duly appointed or licensed according to the said laws, and *it was by virtue of such laws* that the *Halley* was compelled to take on board and to be given in charge, and, until the time of the collision as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defendants or their agents did not select, and had no power of selecting."

The 3rd article of the reply was as follows :—"By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another

*3 R. 339*

*Part 358*  
*4 R. 2. 6*  
*1 R. D. 46*

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Nov. 5. *Brett, Q.C.*, and *Cohen*, in support of the motion. The English law, which ought alone to govern this case, is clear. First, selection is a necessary condition to constitute the relation of master and servant; a person cannot be answerable for a tort by another unless he has employed him: *Reedie v. London and North Western Railway Company* (1); but a compulsory pilot, who has a right to take command of the ship, is not the servant of the shipowner: he cannot control the pilot in the mode of performing the work: in such cases, therefore, he is not liable. An English court will take notice of foreign law only in cases of contract, and will interpret the contract according to the *lex loci*, in order to effectuate the intention of the parties.

[THE COURT referred to the *Milford*. (2)]

But in cases of tort, the remedy must be that of the Forum: *The Maria* (3); *The Vernon* (4); *The Annapolis*. (5) There is no authority to shew that there is a remedy here for a tort abroad which is not a tort here: *Savigny, System des R. R.*, vol. 8, s. 374.

(1) 4 Ex. at p. 255.

(2) Swab. 362.

(3) 1 Wm. Rob. 95.

(4) 1 Wm. Rob. 316.

(5) Lush. 295.

*See 4 547*



The Belgian law was not violated in Belgium by the defendants : 1867  
 the only violation was their refusal to pay the damages ; and that THE HALLEY.  
 took place here. This case must, therefore, be governed by the  
 general maritime law of this country : *The Hamburg* (1) ; the plain-  
 tiffs' remedy can only be in accordance with the *lex fori*, and the  
 3rd article of the reply ought to be struck out.

[THE COURT. You invoke the Belgian law to shew that pilotage  
 was compulsory, but you say that the other side may not invoke  
 it to carry the case further.]

*Manisty, Q.C.*, and *Clarkson*, for the plaintiffs. The same law  
 which directs the compulsory employment of a pilot, also says  
 that the owner shall remain liable for the damages : we must take  
 the whole law. The *lex loci* governs the right ; the *lex fori* the  
 procedure ; *Cammell v. Sewell* (2) ; *Mostyn v. Fabrigas*. (3) The  
 English law applies only to torts committed in England ; cases on  
 the high seas must be governed by maritime law. In this case  
 the shipowner took the pilot on certain terms, one of which was to  
 continue liable for the acts of the pilot : if this action had been  
 brought in Belgium, no question would have arisen. It is sub-  
 mitted that this Court ought to administer the same remedy as in  
 the country where the wrong was done.

*Brett, Q.C.*, in reply, referred to *The Amalia* (4), as an authority  
 for applying the *lex fori* to this case.

It is fully commented on in the judgment.

*Cur. adv. vult.*

Nov. 26. SIR ROBERT PHILLIMORE. In this case the owner  
 of a Norwegian vessel has brought an action against the owner  
 of an English vessel for damage done to the Norwegian ship in  
 the territory of Belgium.

One of the functions, and not the least important, of the High  
 Court of Admiralty is to administer international justice in mari-  
 time suits between foreigners who resort to its jurisdiction, or, as  
 in the present instance, between the foreigner and the British  
 subject. The prize jurisdiction of this Court administers the *jus*  
*inter gentes*, or public international law, and what is called the

(1) *Brow. & Lush.* 253.

(3) 1 Sm. L. C. 6th ed. 623.

(2) 5 H. & N. 728.

(4) *Brow. & Lush.* 151.

*6 Dec 1891*

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instance jurisdiction administers the *jus gentium*, or private international law. In order to attain this end, the rules of pleading and the general mode of investigating and trying the merits of such cases when they come before it, are simple, free from technicality, and calculated to do substantial justice. In this Court as Sir J. Nicholl observes in the *Girolamo* (1), "the law maritime according to the law of nations is to be administered;" and again he says (2) it "is governed by the rules" (he is not speaking of the prize Court) "of international law." To the same effect in the *Zollverein* (3), Dr. Lushington, in the case of a collision between a British and foreign vessel, says: "The case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place." And in the *Golubchick* (4), he says: "Upon general principle I apprehend, that this Court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description." If, therefore, this collision had taken place upon the high seas it must, upon general principles, have been adjudicated according to the "*lex maris*."

[His lordship then stated the pleadings as above set out, and continued]:—

The claim of the petitioner in this case is founded, according to the Norman language of our common law, upon a tort committed by the defendant; according to the language of jurisprudence, familiar to this Court, upon an *obligatio ex maleficio*, or as it is more generally, though perhaps less accurately, termed, an *obligatio ex delicto*, incurred by the defendant. "*Res sic habet*," Donellus says, "*ut quemadmodum non omne delictum est maleficium, ita non ex quovis delicto nascatur obligatio sed solum ex maleficio*." (Donellus lib. xv. c. 24, s. 3.) In the case before me this tort was committed, or this *obligatio* was incurred, in the territory of a foreign state. I think it expedient therefore, to dwell for a moment on the peculiar character of this *obligatio*, with the reasoning upon which my judgment is in some measure connected.

According to the Roman law, which on this subject has been

(1) 3 Hagg. Adm. at p. 177.

(2) 3 Hagg. Adm. at p. 189.

(3) Swab. at p. 99.

(4) 1 Wm. Rob. at p. 147.

generally adopted by continental Europe, the facts which give rise to a legal obligation are said to be four—*contractus*, quasi *contractus*, *maleficium*, quasi *maleficium*. The two former create an obligation with the consent of the obliged person (*obligatus*); the two latter without his consent. It is with the third alone with which we are at present concerned; namely, *obligatio ex maleficio*, or *delicto*, for it is not necessary to consider the distinction between this and the *obligatio ex quasi delicto*.

*Delictum* (Donellus says, with his usual accuracy and perspicuity), “*id est factum id, quo nocetur alteri, jure ita coeretur, ut sarciat alteri quod abstulit.*” (Donellus, lib. xii. c. 5, s. 12) “*Ex tali culpâ*” (that is *maleficio*) Grotius says, “*obligatio naturaliter oritur, si damnum datum est, nempe ut id resarciatur.*” (De Jure Belli et Pacis, lib. ii. c. xvii. sec. 1) This is in truth the language of natural justice. The form of remedy under the Roman law was supplied by the *Lex Aquilia*. The passage in the Digest upon this very subject of collision at sea contains (as so many other passages in that repertory of jurisprudence do) the written equity which the reason of the thing requires. “*Si navis tua impacta in meam scapham, damnum mihi dedit, quæsitum est, quæ actio mihi competerit? Et ait Proculus, si in potestate nautarum fuit, ne id acciderit, et culpâ eorum factum sit, lege Aquiliâ cum nautis agendum: quia parvi refert, navem immittendo, aut servaculum ad navem ducendo, an tuâ manu damnum dederis; quia omnibus his modis per te damno adficior: sed si fune rupto, aut, cum a nullo regeretur navis incurrisset, cum domino agendum non esse,*” (Dig. Lib. ix. Tit. ii. 29, 2). According to the principles of natural justice, the wrong-doer to this Norwegian vessel is bound to replace her owner in the position in which he was before the wrong was done; the owner is entitled to what civilians call a *restitutio in integrum*.

I gladly avail myself of Dr. Lushington's language in this matter in a case in which he distinguishes (speaking of the duty of the Registrar and merchants, as referees of the High Court of Admiralty) between cases of collision and cases of insurance. “One,” he says, (the *Gazette*) (1), “of the principal and most important objections to the report under consideration is this, that the Registrar and merchants, in fixing the amount to be paid for repairs, and the

(1) 2 Wm. Rob. at p. 280.

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supply of new articles in lieu of those which have been damaged or destroyed, have deducted one-third from the full amount which such repairs and new articles would cost. This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question then which I have to consider is the applicability of the rule in question to a case of the present description; and this question, it is obvious, involves a principle of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damages in all other similar cases. Now, in my apprehension, a material distinction exists between cases of insurance and cases of damage by collision, and for the following reasons." And then the learned judge explains the nature of an insurance contract, and he continues: "With regard to cases of collision, it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the damage arises not *ex contractu*, but *ex delicto* of the party by whom the damage has been done; and the measure of the indemnification is not limited by the terms of any contract, but is co-extensive with the amount of the damage. The right against the wrong-doer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification, without exposing him to some loss or burthen which the law will not place upon him."

Again in the case of the *Amalia* (1), the same learned judge says: "The principle of limited liability" (and in this case it is contended that the liability of the British owner is taken away altogether) "is that full indemnity, the natural rights of justice, shall be abridged for political reasons." This is a

(1) *Brow. & Lush*, at p. 152.



subject to which I must again advert in another part of my judgment. At present it is enough to say that the dictates of natural justice appear to be in favour of the petition of the Norwegian vessel in this case, which prays this Court to cause the British vessel, the wrong-doer, to make that reparation for wrong done by her which the *lex loci commissi delicti*, had the suit been brought in a Belgian court, would have enforced.

It is, however, contended on behalf of the British vessel that this Court cannot apply this law to this case; that it must, partially at least (the importance of this qualification will be presently seen), disregard the law of the place in which the wrong was done, and apply that of the place in which the action for redress is brought; that, in other words, the *lex fori*, and not the *lex loci commissi delicti*, governs this case. If this be so, the foreign owner will obtain, practically speaking, no compensation for the wrong done to his vessel by the British ship, the owner of which will practically escape altogether unscathed. It is not, therefore, too much to say that the arguments and the precedents which are brought forward in favour of such a result must be narrowly examined and carefully scanned. It certainly may be that the hands of the Court are tied by municipal law, and prevented from administering the relief which, upon general grounds, it must desire to administer to the petitioner in this case. I now proceed to examine the reasoning and authorities which have been advanced in support of this proposition.

The contention on the part of the British owner is, that the *lex fori* must govern this case, not because that law is made binding on the Court, as in the case of the *Amalia* (1), by a British statute, but because it is made binding on the Court by an established principle of law, which is to be collected from judicial decisions and the dicta of accredited writers. It is contended, then, that this question belongs to the domain of the *lex fori*, inasmuch as it is a question relating to the remedy, and not to the right, of the party suing. It becomes important to see what authority, in principle or precedent, there is for this proposition. It is well settled by decisions of the tribunals of this country that all which relates to the form of the remedy, and the mode of enforcing it, all

(1) *Brow. & Lush.* 151.

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that relates to the conduct of the suit in court, the rules of evidence, and to procedure, shall be governed by the *lex fori*. Indeed, it is a well-established rule of international comity, as old, certainly, as the time of Bartolus, that “*de his quæ pertinent ad litis ordinationem inspicitur locus judicii*.” But to the further proposition, namely, that the nature and character of the remedy itself—for instance, the measure of civil damages for a breach of contract, or for the non-fulfilment of any legal obligation—is to be regulated by that law, I cannot assent. I am not aware of any direct authority for it; certainly it cannot, in my opinion, be maintained upon principle; and so far as the analogy of the obligation arising from contract applies to this case of *obligatio ex delicto*, the judicial precedents which I have been able to find are adverse to this proposition.

Mr. Justice Washington, in a judgment delivered in the District Court of Pennsylvania, observes (*Peter’s Circuit Court Reports*, 230): “The rate of damages to be recovered for a breach of contract, is a part of the right to which the injured party is entitled, and it is totally distinct from the remedy provided for enforcing it. In the former case, the *lex loci*, where the contract was made or broken, is to prevail; in the latter, the *lex loci* of the forum, where the remedy is provided.” The same learned judge, in an earlier and very singular case, *Courtois v. Carpentier* (1), laid down the same principle. It was an action in the Pennsylvanian Court, on a note payable in sugar, and given in Guadaloupe, where a particular custom prevails in relation to the payment of such notes in sugar. Mr. Justice Washington said: “The laws of the country where this contract was made must govern. These notes were payable in Guadaloupe, in sugar, at a valuation. The defendant having sued here, cannot complain, if his situation is not made worse than it would have been in Guadaloupe. But as, according to our forms of proceeding (and as to them the laws of our country must govern), a judgment cannot be rendered for sugar, the value in money must be given, which, in effect, is the precise sum stated in the note.” Mr. Justice Story refers to these and to other American, as well as some English, cases, in the following paragraph (*Story’s Conflict of Laws*, s. 307): “Analogous to the rule

(1) 1 Washington’s Rep. 377.

respecting interest would seem to be the rule of damages in cases of contract, where damages are to be recovered for a breach thereof *ex morâ*, or where the right to damages arises *ex delicto*, from some wrong or injury done to personal property. Thus, if a ship should be illegally or tortiously converted in the East Indies by a party, the interest there will be allowed by way of damages in a suit against him. So the rate of damages on a dishonoured bill of exchange will be according to the *lex loci contractus* of the particular party. So, if a bill of exchange be made in one state and endorsed in another state, and again endorsed by a second endorser in a third state, the rate of damages upon the dishonour of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or by endorsing the bill. So, if a note made in a foreign country is for the payment of a certain sum in sugar, and by the custom of that place the like notes are payable in sugar at a valuation, the law of the place is to govern in assessing the damages for a breach thereof.”

In the case of the *Zollverein* (1) Dr. Lushington observed: “The principle which governs all these questions of jurisdiction and remedies is admirably stated by Mr. Justice Story (*Conflict of Laws*, s. 558), ‘In regard to the rights and merits involved in actions, the law of the place where they originated is to be followed; *but the forms of remedies*’ (it is important to observe these words) “and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act.’” And in another part of his judgment (1) he says: “Generally, when a collision takes place between a British and foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of the country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to the *lex fori*.” It is to be observed

(1) Swab. at p. 98.

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THE HALLEY. here that the learned judge is reported as having used the expressions "the remedy and form of proceeding must be according to the *lex fori*," but I think that if these words be correctly reported, there must be an unintentional error in the language of the learned judge, who must have meant to say "the form of remedy and of proceeding," an alteration which brings these words and the judgment in harmony with the previous citation from Story, on which, indeed, it was mainly founded.

I must not, however, pass by two judgments of my immediate predecessor in this chair, to which I drew the attention of counsel, because they may be fairly cited by the defendants as favourable to the position for which they contend. They are, in fact, the converse of the present case. In them the judge decided that the *lex fori*, where more favourable to the foreign suitor than the *lex loci contractus*, should be administered. In the case of the *Milford* (1) the question as to the application of s. 191 of the Merchant Shipping Act, 1854, to the suit of a foreign master against the freight for wages arose, and the Court observed as follows (2): "There are no negative words which tend to shew that the Court should not apply s. 191 to foreign masters and seamen. As there are no such words, is it consistent with justice that the Court should hold its hand in all these matters, and say that as to foreign masters it will impose a restriction not found in the statute? I think I am bound to apply the remedy given by the statute." In the case of the *Jonathan Goodhue* (3), Dr. Lushington remarked: "When this case was first brought before the Court, it was said that the American law would exclude the master from the benefit of the statute,—that it was a legal incident of the contract that the master should have no lien on either ship or freight for wages or advances. But pending that question, the Court decided in the case of the *Milford* (1), that the remedy must follow the *lex fori*, and that a foreign master was entitled to the same remedy against ship and freight as a British master. I adhere to that judgment, though I repeat what I then said, that it was a case of great doubt and difficulty."

I must say that the reasoning of the learned judge which led to the decisions in these cases was never satisfactory to my mind,

(1) Swab. 362.

(2) Swab. at p. 367.

(3) Swab. at p. 326.

4/m H 417

4/m H 418



and I am glad to learn that in a more recent case mentioned to me by Mr. Clarkson, the learned judge expressed himself willing to reconsider the principle of these decisions. It is to be observed also that they rested in great measure upon the construction of a British statute, and in the present case we have no statute to consider.

With respect to the application of the "lex fori" to this case, an observation of some importance arises out of the special character of the law itself. The lex fori in this instance is founded, as Lord Stowell observed in the *Carl Johan* (1), upon considerations of domestic policy. The English legislature has thought it expedient that only certain persons under certain restrictions shall be allowed to act as pilots in certain British waters, and that it shall be compulsory upon all masters of ships to place the navigation of their vessel while passing through these waters under the control of one of these licensed pilots. And the common law of England has ruled that in such cases the natural responsibility of the owner of the vessel for injuries done to the property or persons of others by the unskilful navigation of that vessel shall cease and be transferred to the pilot. This law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant, and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third parties are concerned, must always be considered as the acts of the owner. No such presumptions, it is said, exist in the case of compulsory pilotage, in which the state forces its own servant upon the owner, and indeed to some extent reverses the usual order of things on board ship by rendering it incumbent on the master to obey the orders of the pilot. But the considerations of domestic policy which have created this peculiar law are not founded on principles of universal law or natural justice. They are considerations of British policy, which apply to British waters and territory, but not to the Flushing Roads, in which this collision took place. In the earlier part of this judgment I said that natural justice appeared to favour the admission of the plaintiffs' reply in this case. I must here observe that it has not been argued before me that the Belgian law is contrary to

(1) 1 Hagg. Adm. at p. 113.

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Lord Stowell's mind, furnished as it was with the principles of jurisprudence, naturally rejected the argument for the immunity of the wrong-doing vessel. In the case of the *Neptune the Second* (1), he said: "It is acknowledged in this case that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was at the time under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended in the argument that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained, that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof that the master acted throughout in con-

(1) 1 Dodson, 467.

formity to the directions of the pilot. But this, I conceive" (says this great master of jurisprudence), "is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owners."

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I will frankly say that it appears to me difficult to reconcile the claims of natural justice with the law which exempts the owner, who has a licensed pilot on board, from all liability for the injuries done, by the bad navigation of his ship, to the property of an innocent owner. *Obligatio* is (according to the admirable definition in the *Institutes*) "*vinculum juris quo necessitate astringimur alicujus rei solvendæ*;" it is "*lien de droit*," as the French say. No one acquainted with the working of this law, which exempts the wrong-doing vessel from liability in this Court, can be ignorant that it is fruitful in injustice. On the one hand, the master is tempted to abstain from all control over his vessel, lest he should afford grounds for the argument that by interference with the pilot he has deprived himself of the legal immunity which he would otherwise enjoy. On the other hand, it is obvious that great inducements may be offered to the pilot to shield the incapacity or mismanagement of the master and his officers by taking all the blame upon himself. It is true that by so doing he may subject himself to censures and punishment from the Trinity House. Certainly, in cases where the evidence clearly established very gross negligence or want of skill on his part, such would be the result; but the greater number of cases are not of this extreme description. It is impossible to doubt that an owner who, as in a recent case before me, would, but for the fact of having a licensed pilot on board, have been compelled to pay perhaps 25,000*l.* to the ship which he had sunk, lies under a very strong temptation to take whatever measures may be requisite for obtaining the two necessary statements of the pilot, namely: first, that he alone had

1867      the management of the vessel ; and secondly, that his orders were  
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 put to the pilot by those who conduct the defence of the wrong-  
 doing vessel.

Again, I cannot help thinking that the doctrine, so clearly explained by Lord Cranworth in *Reedie v. London and North Western Railway* (1), of the owner being responsible only for the acts of his own servant, has been somewhat strained in its application to the case of the licensed pilot. I do not quite understand why, because the state insists, on the one hand, upon all persons who exercise the office of pilot within certain districts, being duly educated for the purpose and having a certificate of their fitness, and insists, on the other hand, that the master shall within these districts take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end ; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates. If compulsory pilotage be at all expedient, a question open to very considerable doubt, it seems to me more just that the master of the wrong-doing ship should be left to his action against the pilot who has badly navigated her, than that the owner of the injured ship should be placed in that predicament. I incline to the opinion that the Belgian law, as it appears in these pleadings, is more consonant with natural justice than our own on this subject. Be this, however, as it may, it has not, I repeat, been argued that the Belgian law is inadmissible here, because it is at variance with natural justice, and if such an argument had been advanced, I should have expressed my dissent from it.

Having regard, then, to the fact that the *lex fori* is founded upon special considerations of public policy applicable only to British territory, and that the admission of the foreign law, the *lex loci delicti commissi*, to govern this case is not prevented by reason of its repugnance to natural justice or to public policy, —if the question before me were as to the law which ought to govern the fulfilment of the obligation arising out of an ordinary contract made in Belgian territories, it could not, I think,

(1) 4 Ex. 244.



be successfully contended that I ought to apply the English law to such case.

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To such a contract I might apply the principle of Lord Stowell's judgment in *Dalrymple v. Dalrymple* (1), and adopting, with a slight alteration, his very words, say, this contract being established in an English Court must be adjudicated according to the principle of English law. But the only principle applicable to such a case by the law of England is, that the character of this obligation (Lord Stowell says the validity of Miss Gordon's marriage rights) must be tried according to the law of the country in which it had its origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Belgium.

A question, however, arises as to whether because in this case the obligation to pay damages arises, not, as in a case of contract, out of the free will of the obligor, but out of the order of the law consequent upon the wrongful act of the obligor, the application of the principle ought to be different. Does it affect the principle upon which justice ought to be administered, that the obligation arises out of a delictum, and not out of a contractus? The authority of Savigny, which it was truly said would have great weight with me, is cited in favour of the application of the *lex fori* in such a case: (Savigny, *System des R. R.* viii. pp. 208, 278). The opinion of this most learned and admirable writer is that the law which prevails in the place in which a contract was intended to be fulfilled ought to be administered by the forum before which the fulfilment is sought to be enforced. He places the exceptions to this rule under two categories; it is only with the first that we are now concerned. Under this category of exceptions he ranges all cases in which the *lex loci* or the *lex loci solutionis* comes into conflict with what he calls a positive stringent law of the forum. Having laid down this principle, he proceeds to place the obligation *ex delicto* under it. The passages in which he does so are perhaps the least satisfactory in his work, and this particular branch of his subject is but cursorily treated. I think, however, that under this category of a positive stringent law, he did not intend to include such a law as the English law with respect to pilots and the

(1) 2 Hagg. Consist. 54, 58, 59.

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It is well remarked by Savigny that in applying the principles with respect to the enforcement of the obligations which arise ex contractu to the obligations which arise ex delicto some difficulty is caused by the peculiar character of the latter obligation, inasmuch as the enforcement of it borders very closely upon the administration of criminal law. Now it is a maxim of private international law, not indeed universally recognized, but I think firmly incorporated into the jurisprudence of this country, that the Court of one state cannot be required to administer the criminal law of another. It is with the view of getting rid of any embarrassments created by this difficulty between the civil obligation and the punishment of the criminal offence, that eminent jurists have generally adopted the following distinction, which appears to me just and sound. The obligatio ex delicto may be followed by two distinct consequences—to make compensation in civil damages for the injury inflicted, and the liability to undergo a punishment, such as a penal fine or imprisonment, whether at the instance of the person injured, or by the intervention of a public officer of the state. "*Eodem delicto et civilis persecutio ad pœnam privatam et judicium publicum esse possit,*" J. Voet (L. 47, t. 1. ii.) says; and Donellus distinguishes between the civil action "*de privato damno et pecuniâ quam inde debitam actor*

prosequatur," and "quatenus de his agitur criminaliter ad pœnam et vindictam criminis. (L. xvii. c. 16. 1, Comment. de jure civili). To the same effect is the passage in the Institutes. (L. 4, t. 4.) It is with the former consequence alone of the delictum that the forum of a foreign state can be properly concerned.

I must now advert to the case of the *Amalia* (1) decided in this Court, and afterwards adjudicated upon by the Privy Council, which it is said renders it incumbent upon me to apply the *lex fori* to the present case. The *Amalia* was a cause in which the owners of a British steamship, the *Amalia*, petitioned this Court for the purpose of obtaining a declaration of the limitation of their liability under sect. 54 of 25 & 26 Vict. c. 63, in respect of a collision which had taken place between that vessel and a Belgian steam-vessel, the *Marie de Brabant*, in consequence of which the *Marie de Brabant* with her cargo was sunk and lost, and several of the crew drowned. The collision in question happened on the 15th of May, 1863, in the Mediterranean Sea. When this case was before this Court, Dr. Lushington observed (2): "The principle of limited liability is, that full indemnity, the natural rights of justice, shall be abridged for political reasons." And further on (3) he observes: "I have always recognized the full force of this objection, that the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction. . . . Now, fully recognizing the force of this *primâ facie* objection, I do not think it is removed by the ingenious suggestion that limited liability is a part of the *lex fori*." And here I may ask if the limitation of liability be not part of the *lex fori*, why should the exemption from all liability belong to that category? And Dr. Lushington then decided that the construction of the 54th section of the Merchant Shipping Act of 1862 (25 & 26 Vict. c. 63), which contained the words, "the owners of any ship, whether British or foreign, shall not," &c., related equally to British and foreign vessels, and that to the latter, in a British Court, as well as the former must be applied the doctrine of limited liability. The Judicial Committee of the Privy Council upheld, not without doubt, apparently, this decision. Lord Chelmsford, who delivered the judgment of their Lordships,

(1) Brow. &amp; Lush. 151.

(2) Brow. &amp; Lush. at p. 152.

(3) Brow. &amp; Lush. at p. 153.

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observed (1): "The appellants say that the moment a collision occurs, there is a lien upon the vessel which is in fault, and supposing the vessel injured to be a foreign one, that the foreigner immediately acquires this lien to the extent of his damage, and cannot be deprived of it by the municipal law of this country. But suppose the foreigner, instead of proceeding in rem against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the Court would be bound to administer. And it may be asked what breach of international law or interference with the natural rights of foreigners is produced by the legislature saying that all suitors having recourse to our courts to obtain damages for an injury from a person not himself actually in fault, but being responsible for the acts of his servant, shall recover only to the value of the thing by which the loss or damage was occasioned, estimated in a particular manner? It is to be observed that under this view of the 54th section the foreigner will be entitled to the benefit of the act, as well as the British owner of a ship occasioning damage, and he will, therefore, not be exposed to a more extensive liability than the British subject."

It is not necessary for me to make any remark upon the reasoning by which their lordships arrived at this conclusion. I may be permitted to observe, however, that the limitation of the owner's liability to the whole value of the vessel which did the damage, stands upon a very different footing with respect to the claims of natural justice, from the total exemption of the owner from all liability whatever for the act of his vessel. However this may be, the judgment in the *Amalia* does not appear to me to govern this case. The *res decisa* in the *Amalia* was that the 54th section of the Merchant Shipping Act must be holden by a British court of justice to apply to a foreigner as well as a British vessel, although the collision had taken place between them upon the high seas. It was a decision upon the words of that statute, and so far it is binding upon this Court. In no other way am I able to reconcile their lordships' judgment in this case with the principles of their

(1) Brow. & Lush. at p. 159.



previous decision in the case of the *Bold Buccleugh*. (1) Hear what Lord C. J. Jervis, delivering the opinion of their lordships (2), says as to the character of the lien which binds the wrong-doing vessel from the moment that the collision has taken place: "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing, to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached. This simple rule, which in our opinion must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of the *Aline* (3), referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case there was a bottomry bond before and after the collision, and the Court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached,

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(1) 7 Moo. P. C. 267, 284. (2) 7 Moo. P. C. at p. 284. (3) 1 W. Rob. 111.

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Now let me mention a judgment delivered in the Supreme Court of the United States of North America, and certainly entitled to the highest respect in this Court. In the case of *Smith and others v. Condry* (1), to which I was referred by Mr. Clarkson, two ships belonging to subjects of the United States in North America came into collision in the port of Liverpool. The action was brought in the circuit court for the district of Columbia, and came up by writ of error to the Supreme Court. Mr. Chief Justice Taney, in delivering the opinion of the Court, observed (p. 32) as follows: "Upon the evidence above stated, the defendant asked the Court to instruct the jury that under the statutes of Great Britain of the 37 Geo. 3, c. 78, 52 Geo. 3, c. 39, and 6 Geo. 4, c. 125, the defendant was not responsible for any damage occasioned by the default, negligence, or unskilfulness of the pilot. The Court gave this instruction, and that is the subject of the first exception. The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes then in force, and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts." This decision of the Supreme Court of the United States of North America seems to go the whole length of the way which the Norwegian plaintiff desires me to travel, for it is in fact a decision that the Court before which a plaintiff sues for the enforcement of the damages growing out of an obligatio ex delicto ought to measure those damages by the law which bound the obligor and the obligee at the time when the factum obligans (as civilians speak) took place, or, in other words, when the delictum was committed.

Lastly, I must observe upon not the least remarkable feature in the present proceeding, namely, that the defendants are the first to invoke in their own favour the law of Belgium. They plead that

(1) 1 Howard, U.S. Rep. 28.

by that law, applicable to this case, the taking of a pilot on board was compulsory, and there their citation from the Belgian law ceases. The plaintiffs, not unnaturally, plead in their turn the other part of the Belgian law, which is to the effect that the compulsory taking on board of a pilot does not release the master from his liability under the general law for all damages occasioned by the unskilful navigation of his vessel. The defendants contend that the plaintiffs have no right to finish the citation, so to speak, which they the defendants have begun, from the Belgian law; that I must only look at that portion of it which they have selected as being in their favour, and which, as such, they are pleased to lay before me; that it is my duty not to apply either the general *lex maris*, mentioned at the beginning of this judgment, or the whole Belgian law, which combines the obligation to take a pilot with the continuing responsibility of the owner; but to take the former part of that law, which relates to the obligation to take a pilot, and add to it the English law, which exempts the owner from responsibility. This is the tessellated piece of jurisprudence which I am told the law requires to be applied to the case before me. I hope there is no law or legal rule in this country which would compel me to do an act of, what seems to me, such manifest injustice; as at present advised, I know of none.

Upon the whole, after an anxious and, I trust, careful consideration of the principles of law applicable to this case, and of the authorities and arguments which have been laid before me, I am of opinion that the plaintiffs are entitled to plead that the law of Belgium, within whose territorial waters their vessel received damage from the vessel of the defendants, renders the owner of the latter vessel, although compelled to take a pilot on board, liable to make reparation for the wrong which she has done. The question is one of grave importance, and submitted in this country for the first time unhappily to my decision. I am glad to remember that, if I have erred, my error will be corrected by the Court of Appeal, and I will readily accord to the defendants, if they desire it, the permission to appeal, which the statute requires, from this decision upon the admissibility of the plaintiffs' plea.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*

Attorneys for defendants: *Field & Co.*

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Dec. 3.

*Cause of Damage for personal injury against a Ship—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7—"Damage done by any Ship"—Arbitration.*

*Post 320, 2PC. 447, 3Q.L. 305, 7CO 299, 8Q.L. 579, 2PD 164, 673.*  
By the 7th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), the Court of Admiralty has jurisdiction to entertain a cause of damage for personal injuries done by a ship.

A diver while engaged in diving in the River Mersey, was caught by the paddle-wheel of a steamer and suffered considerable injury, for which he brought an action against the owners, which was referred to arbitration. By the agreement of reference, all the rights of the plaintiff were reserved in case the award of the arbitrator should not be performed. The arbitrator awarded compensation, but the defendants never paid. The plaintiff then instituted a cause of damage against the ship. On motion to dismiss the petition:—

*Held*, First, that the Court had jurisdiction to entertain the suit: Secondly, that the plaintiff, by submitting to arbitration, had not debarred himself from proceeding in rem in the Admiralty Court.

THIS was a cause of damage instituted by Ellis Jevons, a marine diver, against the steamboat *Sylph*.

The petition set forth that the plaintiff, a marine diver residing at Liverpool, was on the 29th of October, 1866, engaged in diving in the River Mersey, a little to the south of the Great Landing Stage, for the purpose of reporting on the condition of a vessel which had been sunk there; that for the purpose of enabling the plaintiff to carry on his diving operations, a barge was anchored in the Mersey, to which barge the plaintiff was attached by means of ropes, and was supplied with air by a tube passing between him and the barge; that while the plaintiff was so engaged in diving, and was under water, the steamboat *Sylph*, which was then employed as a ferry-boat between the Great Landing Stage and New Ferry, was so negligently navigated that she came into contact with the plaintiff and with the ropes by which the plaintiff was attached to the barge, and the paddle-wheel of the steamboat caught the ropes, and the plaintiff was carried round by the paddle-wheel and was thereby much injured, &c.

The 4th article of the petition stated that the plaintiff's claim in respect to the injury was referred to an arbitrator, who, on the 15th of January last, awarded a sum of 410*l.* as compensation, the payment of which the plaintiff had been unable to obtain.



The 5th article stated that by the agreement of reference all the rights and remedies of the plaintiff were expressly reserved in case the award of the arbitrator should not be performed by the defendants, the Mersey River Steamboat Company. The petition then prayed the Court to pronounce for the damage, and to order the sum of 410*l.*, or such sum as to the Court should seem proper, to be paid to the plaintiff, and to condemn the defendants in costs, &c.

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An appearance was entered on behalf of Alexander Shand, the mortgagee of the vessel, who prayed the Court to dismiss the petition altogether, or to strike out the 4th and 5th articles relating to the arbitration.

Upon this motion two questions were raised:—

1st. Whether the Court had jurisdiction to entertain the suit under the 7th section of the Admiralty Court Act, 1861, which enacts that “The High Court of Admiralty shall have jurisdiction over any claim for *damage done by any ship*”?

2nd. Whether the plaintiff, by submitting his case to arbitration, had abandoned his right to bring an action upon the same subject in any court?

Nov. 12. *Butt* in support of the motion. The Court has no jurisdiction to entertain this suit. The word “damage” in the 7th section of the Admiralty Court Act, 1861, means damage to property, and has never been understood to mean damage to person. In the *Malvina* (1), Dr. Lushington says, “the utmost jurisdiction is given to the Court in cases of collision;” and this expression is repeated in the same case on appeal to the Privy Council (2). The 4th and 5th articles of the petition furnish in themselves a conclusive answer to the claim. In an action to recover damages, which has been referred to arbitration and in which an award has been made, the plaintiff can only sue upon the award, and not on the original cause of action; that is the case here: an award has been made, and the plaintiff has thereby lost his remedy against the ship; he only has his remedy on the award: *Gascoyne v. Edwards*. (3)

*Lushington* and *R. G. Williams*, for the plaintiff. This Court had anciently jurisdiction in cases like the present: *De Lovio v.*

(1) Lush. at p. 495; and on Appeal, Brow. & Lush. 57. *yfm R 527*  
(2) Brow. & Lush. at p. 58. (3) 1 Y. & J. 19.

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*Boit* (1); it only lost that jurisdiction by prohibition from the common law courts. The word "damage" in the Admiralty Court Act, 1861, applies generally to property, but it has also a legal meaning of damage to person. In the *Diana* (2), where this Court held that it had jurisdiction in case of collision in inland waters, and in the *Malvina* (3), both this Court and the Privy Council gave large construction to that act.

Damage has not been confined to cases where the injury has been only between two vessels coming in collision. In the *Uhla* (4) the Court gave damages against a vessel which came in collision with a pier. Suppose a person standing on the pier had been injured: could it have been said that the Court has jurisdiction in the case of an inanimate and not of a living body? As to the arbitration, no payment has been made, and the agreement not having been performed, all the rights and remedies of the plaintiff are preserved: an award cannot be pleaded without performance: *The Bengal* (5); *Nelson v. Couch*. (6) But we do not wish to rest the case on the decision of the arbitrator, which ought not to have been stated in the petition. On the broad equity of the case it is submitted that the plaintiff has a right to proceed against the ship.

*Butt* replied.

*Cur. adv. vult.*

6 QB 732  
Dec. 3. SIR ROBERT PHILLIMORE. That this Court had originally jurisdiction in such a case as the present, I have no doubt whatever. It is given by the terms of the patent under which I hold my office; and it is clear from the old authorities on the subject that the Court had jurisdiction over all torts and injuries done within the ebb and flow of the tide, as well as upon the high seas. The whole law is collected in the judgment delivered by Mr. Justice Story in the case of *De Lovio v. Boit*. (1) This judgment, in truth, exhausts all the learning upon the subject. I will only observe that the exercise of jurisdiction in this case is supported, among other authorities, by that of the Black Book of the Admiralty, to which Lord Stowell on various occasions referred

(1) 2 Gallison, 398.

(2) Lush. 539.

(3) Lush. 493; on Appeal, Brow. & Lush. 57. *9 Jan 1857.*

(4) See post, p. 29, note (1).

(5) Swab. 468.

(6) 15 C. B. (N.S.) 99.

as a repertory of the common law and customs of the sea, and of the jurisdiction of the Admiralty Court.

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There is no doubt that in and before the reign of Edward III. the plaintiff would have had his remedy here for this tort. This original power has been, however, curtailed in various respects by statute law, and by prohibitions by which, at one time, the jealousy of the common law courts thwarted and confined the jurisdiction of a court whose proceedings were founded upon the civil law; and Story demonstrates, as, indeed, does Mr. Edwards, in his work on Admiralty Jurisdiction, that the authority of Lord Coke upon the subject of Admiralty jurisdiction is inaccurate and untrustworthy. The statute of 13 Rich. 2, c. 5, is generally referred to as the first restraining statute. It enacts, "that the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, as it has been used in the time of Edward III." The 2nd of Hen. 4, c. 11, confirms the statute of Richard by the addition of penalties and other means. It was upon the construction of these statutes that the common law courts endeavoured to abridge, and did abridge, the jurisdiction of this Court as to various subjects over which the patent of the Judge still gives him authority, especially with regard to contracts made at sea.

The Admiralty Court in the United States has recovered jurisdiction on this and on other subjects, which it is, however, perhaps not now competent to this Court to entertain. With respect, however, to the particular tort which is the subject of this suit, it is to be observed that this Court has always had a jurisdiction over personal injuries committed on the high seas, and has entertained actions in personam against captains of merchant vessels for inflicting, while on the high seas, excessive punishment upon seamen. In the *Agincourt* (1) Lord Stowell condemned the captain of an East Indiaman in 100*l.* damages, with costs. In the *Louther Castle* (2) he entertained a similar action, but held the charge against the captain not proved. In the *Ruckers* (3), Lord Stowell went a step further, and allowed a civil suit by a passenger against a master for ill-treatment on the high seas. Reports of cases (both of the Admiralty and Ecclesiastical Courts) were then of recent

(1) 1 Hagg. Adm. 271.

(2) 1 Hagg. Adm. 384.

(3) 4 C. Rob. 73.

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date, but the Registrar, on searching the Records back to 1730, found many instances of such suits. These were cases of action against the person: the present is a suit in rem. They were cases also in which the tort was committed on the high seas, and not like the present, in the body of a county. I observe that in these cases, as in the present, the argument as to the incompetence of this Court to estimate personal damages, and the reasoning of Mr. Dunning in *Le Caux v. Eden* (1) to this effect was cited and overruled by the Court.

I should, however, have hesitated to entertain this suit, having regard solely to the old law of this Court, although no prohibition upon this matter has ever been issued to this Court; and I am sure it would not be the disposition of Courts of common law in these days to grant prohibitions as they were formerly granted, out of mere jealousy of the jurisdiction of this Court; more especially since this court has been created by recent statute a Court of Record. (2) By the 3 & 4 Vict. c. 65, the jurisdiction of this Court was much extended (3), and by the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 7, it is enacted that the "High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." In the case of the *Diana* (4), Dr. Lushington said, that "the object of the act," as stated in the title and preamble, is "to extend the jurisdiction" of the Court. The 7th section, which deals with the subject of damage, does not particularize any circumstances to which the jurisdiction of the Court is to extend, but "gives the Court jurisdiction in the widest and most general terms." In the previous case of the *Malvina* (5), he had held that "the utmost jurisdiction is given to the Court in cases of collision," and that the 7th section of the

(1) 2 Douglas, at p. 600.

(2) 24 Vict. c. 10, s. 14 :—"The High Court of Admiralty shall be a Court of Record for all intents and purposes."

(3) Sec. 6 :—"The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessities

supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas at the time when the services were rendered, or damage received, or necessities furnished, in respect of which such claim is made."

(4) Lush. at p. 540.

(5) Lush. at p. 495.



act extended to the body of a county. And in the case of the *Uhla* (1), the Court allowed the Falmouth Dock Company to institute a cause of damage against a ship for injury done to a breakwater. Looking to these decisions—to the very wide language of the statute—to the exercise of jurisdiction by Lord Stowell in like cases over torts committed on the high seas—I think I cannot refuse the plaintiff permission to institute this suit, unless he has, by the agreement to submit to arbitration, debarred himself from the power of resorting to this Court.

I have looked into the cases cited on this subject, *Gascoyne v. Edwards* (2), and others; but if I understand rightly the 5th article of the petition, they do not govern this case. I have borne in mind also the other objections which were stated by the counsel for the plaintiff, among them, that arbitration could not be put higher than a judgment; and the case of *Nelson v. Couch* (3) was cited, establishing the principle that a judgment in another court upon the question of personal damages would not prevent proceedings in rem in the Court of Admiralty.

With respect to the argument that this Court is without the proper machinery to estimate personal damages, I have already adverted to the cases in which damages have been awarded for personal torts, and it is clear that under the 514th section of the Merchant Shipping Act (17 & 18 Vict. c. 104) the Court must exercise this power of assessment. Moreover, it has done so already in the case of the *Rouen*, the owners of which were condemned to pay damages to the personal representatives of the deceased: see *Taylor v. Dewar* (4); and I do not see why this

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(1) Cause of damage by Falmouth Dock Company against the *Uhla*, for injury done to the breakwater, by the vessel driving against it. At the hearing of the cause, 7th of June, 1867,

*Clarkson*, for the defendants, submitted that the Court had not jurisdiction, and referred to the *Robert Pow* (Brow. & Lush. 29).

*Lushington*, for the plaintiffs.

DR. LUSHINGTON: The question is as to the construction of the Admiralty

Court Act, 1861, s. 7. I take it to mean every case of damage done by any ship: there is no limitation, no restriction expressed. The cause was then heard, and the *Uhla* was pronounced to blame for the damage.

Proctors for plaintiffs: *Jennings & Son*.

Proctors for defendants: *Clarkson, Son, & Cooper*.

(2) 1 Y. & J. 19.

(3) 15 C. B. (N.S.) 99.

(4) 5 B. & S. at p. 64.

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Court, with the assistance of the Registrar, and, if necessary, other competent persons, should be unable to do justice in the matter.

The defendant has made two prayers—one, that the whole petition be rejected; another, that the articles pleading the arbitration may be rejected. I certainly did not understand why the plaintiff had forestalled the possible defence of the defendant, and answered by anticipation an objection which it was for the defendant to raise. I was informed, however, that this was the result of some arrangement between the parties to bring all the facts connected with the case before the Court in the first instance, and as I have been requested to express, and have expressed, my opinion upon the effect of these articles, I shall not direct them to be struck out, though this manner of pleading is open to objection and must not be repeated in any other case.

I therefore admit the petition.

Attorneys for plaintiff: *Nethersole & Speechley.*

Attorneys for defendant: *Gregory & Co.*

Nov. 21.

[IN THE ARCHES COURT.]

ADLAM *v.* COLTHURST.

*Churchyard—Removal of Human Remains and Earth to adjoining Field—Monition to restore—Field not in possession of defendant—Contempt—Practice.*

In a suit promoted by one parishioner against another for having without lawful authority caused human bones and portions of the soil to be removed from a churchyard to a field belonging to the defendant, the Court of Arches decreed that the defendant had offended against the laws ecclesiastical, and issued a monition to him to replace in the burial ground before a certain day, the bones and earth so removed. The defendant failed to comply with the order, alleging that he was unable to do so by reason that the field in which the bones and earth had been placed was no longer in his occupation or possession:—

*Held*, that his conduct amounted to contempt of Court, and that, unless he obeyed the monition within six days, and certified that he had done so, the Court would pronounce him in contempt, and signify the contempt to the Court of Chancery.

THIS was a suit instituted by William Adlam against John Colthurst, an inhabitant and parishioner, and one of the church-

wardens of the parish of Chew Magna, in the county of Somerset and diocese of Bath and Wells, and was brought by letters of request from the Consistorial Court of that diocese.

The charge against the defendant was, that he had caused human bones and certain portions of the soil in the churchyard of Chew Magna, to be taken out of the churchyard and placed in a meadow belonging to him.

The cause was heard, and witnesses were examined on the 15th and 16th of May, 1867, before the late Dean of the Arches (Dr. Lushington), and on the latter day the learned judge decreed that the promoter had sufficiently proved the articles admitted in the cause, and that the said John Colthurst had offended against the laws ecclesiastical, "by removing, or causing to be removed, earth and bones from the burial ground of Chew Magna;" admonished him to refrain from further offending, and ordered "the said John Colthurst to replace or cause to be replaced within the said burial ground the earth and bones so removed, as aforesaid," and condemned him in the sum of 100*l.* nomine expensarum. On the 15th of June, Dr. Lushington further ordered a monition to issue against the said John Colthurst, admonishing him to obey such order or decree of the Court, and to file in the registry a certificate that he had done so on or before the 7th of July. To this monition, which was personally served upon the defendant on the 25th of June, he was subsequently permitted to file an answer, which was to the following effect:—"That the said John Colthurst is ready and willing to obey the orders of the honourable judge so far as he can so do; but that he is prevented from obeying all those orders, namely, to replace or cause to be replaced within the said burial ground such earth and bones, and other remains, as may have been removed by him from the said burial ground, and to pay the sum of 100*l.* for the following reasons: 1. That the field or meadow, in which the earth from the said churchyard was placed, has ceased to be the property, or in the occupation, or under the control of the said John Colthurst. That, shortly previous to the marriage of a daughter of the said John Colthurst with Henry Bromfield, to wit on the 3rd of October, 1866, the whole of the interest of the said John Colthurst, in the said field or meadow, was transferred by him to trustees for the use and benefit of his

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said daughter and the said Henry Bromfield; and the field or meadow has become, and is now vested, in the said trustees for the uses of the said settlement. 2. That on the order or decree, made by the honourable the judge, on the 16th of May last, becoming known to the said Henry Bromfield, he as the agent of such trustees, and without any communication with the defendant, wrote to Mungo Munro, the bailiff of the farm, a letter dated the 17th of May, 1867, in which, referring to such order, he said: ‘I wish it to be distinctly understood that none of my horses or carts shall be employed in bringing it (the earth and bones alluded to in the order) back, nor will I so far as I have legal power to prevent them, allow any one to go into the Ham, at any rate before the grass is mown, to take the earth away.’ That on the receipt of that letter, Mr. Munro communicated the contents to the defendant, and put up a board in the field called the Ham, and also in an adjacent field, through which there is a considerable thoroughfare, a notice that trespassers off the public path would be prosecuted. 3. That since the service of the monition the defendant has applied to Mr. Bromfield for permission to obey it so far as he can, but by a letter dated the 3rd of July, 1867, Mr. Bromfield refused such permission; and further, gave the defendant a formal notice not to enter on the field for the purpose of interfering therewith or removing therefrom, any of the soil. 4. That the defendant, by reason of his having become chairman to, and connected with, a certain railway, namely, The Bristol and North Somerset Railway Company, was adjudicated a bankrupt at the Court of Bankruptcy for the Bristol district, on the 25th of February, 1867, and still continues to be a bankrupt under the protection of that Court; and has thereby been deprived of the whole of his property of every description, and is consequently without funds.”

A reply to this statement was also filed, which alleged that Mr. Colthurst still resided at Chew Court, with an unmarried daughter and servant, and is apparently in the possession and occupation of the farm and lands (including the field or meadow called the Ham, in which the earth from the churchyard was placed), belonging to and forming part of the Chew Court estate, and that his son-in-law, Mr. Bromfield, is not in occupation of the said house or farm; but resides at Stratford-on-Avon. That Mr. Colthurst, at the time of



the execution of the settlement made on the marriage of his daughter, reserved to himself an interest in Chew Court and farm, and the lands belonging thereto; and that his name still remains on the list of voters for the county in respect of the Chew Court estate. That as regards his bankruptcy, the adjudication on the 25th of February, 1867, could not discharge the defendant from his liability to pay the sum of 100*l.* nomine expensarum, as ordered by the decree and monition of the Court. A rejoinder by the defendant stated that he only resided at Chew Court by the permission of Mr. Bromfield, who has a lease from the trustees of the house, farm, and lands belonging thereto, which are at present managed by his bailiff, and that Mr. Bromfield as the tenant pays the rates and taxes for the same. That the defendant made no reservation in the settlement save a certain reversion for life in the produce, in the event only of the sale of the said estate. Affidavits were filed on both sides, and Mr. Bromfield stated in his, that being extremely desirous under the circumstances, to stop the proceedings in this suit, in April, 1867, he had an interview with Mr. Adlam, and offered on his own responsibility, to take back from the field or meadow into which the soil from the churchyard had been removed, a certain quantity of the soil to the churchyard, saying at the same time, it was impossible to guarantee its being the very same as was removed, by reason that it must have got mixed with the original soil of the field. That after considerable discussion, no agreement was come to because Mr. Adlam declined any terms unless Mr. Bromfield would guarantee the payment of all the costs incurred in the suit. Mr. Bromfield told Mr. Adlam, at that interview, that the field was in his occupation.

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Nov. 2. *Dr. Deane, Q.C.*, for the defendant, in objection to the monition. Under the circumstances of the case, the Court will not enforce its monition. Before the proceedings in this suit were commenced, namely, in October, 1866, Mr. Colthurst transferred all his interest in the estate, of which the field into which the bones and earth had been removed formed part, to trustees, and had ceased to have any right to, or control over it, and the tenant had given him notice that he would not allow the meadow to be disturbed. It is submitted that the Court will not order the

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defendant to enter the close and break the soil belonging to another person against his wishes, that person not being a party to the suit. As regards the costs, Mr. Colthurst became a bankrupt on the 25th of February, 1867, and obtained an interim protection order, by which he is protected from arrest for the costs of this suit: *Wallinger v. Gurney* (1); *Dickens v. Dickens* (2); Griffith and Holmes' Law of Bankruptcy, p. 906.

[SIR R. PHILLIMORE. Does your argument go so far as this, that if a person removed all the bones in the churchyard to another man's field, this Court could not order the offender to restore them to the churchyard?]

That is the argument.

*Dr. Spinks, Q.C.*, and *Dr. Swabey*, for the promoter. The duty of the Court is merely ministerial. *Dr. Lushington*, with the full knowledge of the facts, ordered the monition to issue; and the Court will not reverse his decision. When Mr. Colthurst transferred the meadow to trustees, he had no right to, and could not, transfer the bones and soil removed from the churchyard. As to the costs, Mr. Colthurst continued to defend the suit after his bankruptcy, and would not be protected by the interim order. (3) It is submitted that the Court ought to pronounce him in contempt for non-obedience to its decree.

SIR R. PHILLIMORE. I cannot assent to the proposition that the duty of the Court is only ministerial. The late learned judge ordered the defendant to file a statement of his grounds for objecting to the enforcement of the monition, thereby admitting that some objection might be taken. I think it due to the case and to the arguments that I should take time to consider my decision.

Nov. 21. SIR ROBERT PHILLIMORE. This case was argued before me on the 2nd of November, and my judgment would have been given immediately had I not been requested to defer it for a few days, on the ground that there was a prospect of the matter being arranged out of court. That prospect has disappeared, and I can no longer delay my judgment. The reasons assigned by the

(1) 11 C. B. (N.S.) 182; 31 L. J. (C.P.) 55. *See N 513.*

(2) 2 Swab. & Tr. 645.

(3) See 24 & 25 Vict. c. 134, s. 159, par. 3.

defendant for non-compliance with the order of the Court, both as to the payment of the 100% costs, and the restoring the bones and earth which had been so improperly removed, are these, in substance at least: First, he says he is a bankrupt, and cannot pay the 100%. Secondly, he says that the field into which he has removed the bones and earth out of the churchyard is no longer his, for he has transferred it to trustees for his son-in-law and daughter, and that he cannot lawfully enter upon it for the purpose of obeying the order of the Court.

Looking to the whole of the circumstances of this case, as set forth in the judgment of my predecessor, and the date and character of the pleadings before him, and the minutes of court, I am sorry to say I have no doubt whatever that one if not both these excuses have been resorted to with the deliberate intention of rendering nugatory and treating with contempt the decree of the Court. With regard to the bankruptcy, it is alleged that the defendant became bankrupt before the decree of this Court was made—that he has an order from the Bankruptcy Court which protects him from the process of this Court. The case cited, *Wallinger v. Gurney* (1), shews that the production of an interim protection order under 5 & 6 Vict. c. 116, s. 1, justifies the sheriff in discharging an insolvent out of his custody under a writ of execution, although the debt for which the execution creditor had recovered judgment did not exist until the insolvent's petition had been filed. Therefore, if it be true that the order which Mr. Colthurst has obtained be of this kind, and protects him from debts incurred subsequently to that order, he will, under the authority of this case, be discharged by the sheriff on the production of that order, though he be arrested under the writ issuing in consequence of the decree of this Court. It may, however, be that this 100% costs is not a debt provable under Mr. Colthurst's present petition in bankruptcy. It may also be that, looking to the fact that the date of the defensive allegations given in by Mr. Colthurst in this case, namely, the 21st of February, was the principal cause, according to the opinion expressed by Dr. Lushington in his judgment, of most unnecessary expense; that the date of Mr. Colthurst's becoming bankrupt was

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(1) 11 C. B. (N.S.) 182; 31 L. J. (C. P.) 55. *8 Jan 1868.*

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the 25th of February; that after this date Mr. Colthurst persisted in carrying on a defence in this cause which entirely failed, in which his creditors would, in no event, have the slightest interest, and which, as I have said, was the principal cause of the costs in which he has been condemned;—looking to all these facts, I am not certain that if Mr. Colthurst is not already protected from the payment of these costs under the order which he has obtained, that he will obtain an extended or fresh order of protection, by which he will be enabled to evade this part of the sentence of the Court. At all events, I think the promoter has a right to require this Court to endeavour to enforce the decree for costs which he has obtained in his favour.

Let me here say a word upon the character of the offence of which Mr. Colthurst has been proved to be guilty. I cannot consider it as one of a trivial character. To remove the bones of parishioners from the churchyard into a field where they are to serve the purposes of manure, is a great affront to the feelings of Christian men: a grave violation of the rights of parishioners, as well as plainly contrary to the law of this land. The act is not less liable to this censure, if it be done by a churchwarden, and, as in this case, after he has been apprised of the unlawfulness of such conduct; although Mr. Colthurst may be guiltless, as I have no doubt he was, of any deliberate intention to hurt the feelings of anybody, and may have persuaded himself that no regard for the remains of bodies ought to prevent the making a better pathway to the church. This feeling, however, of respect and pious care for the dead bodies of Christian men is deeply rooted in the inhabitants of an English parish—it is hallowed by many associations, religious and moral, which the law recognizes, and which it is the desire of our Church to cherish and promote.

The language of the prayer by which the churchyard is consecrated, while it expresses the mind of the church, is in harmony with the feelings of the poor as well as the rich parishioner:—“O God who has taught us that there is a difference between the spirit of a beast which goeth downwards into the earth, and the spirit of a man that ascendeth up to God who gave it, and likewise by the example of thy holy servants, in all ages, has taught



us to assign peculiar places where the bodies of thy saints may rest in peace and be preserved from all indignities, while their souls are safely kept in the hand of their Redeemer." I need not read more ; the remainder of the prayer breathes the same spirit. A great indignity, however unintentional, has been inflicted on the bones of a parishioner in this case, and it is within the especial duty and province of this Court to take care that the indignity, as far as possible, may be repaired. It is contended, however, by the counsel for Mr. Colthurst that, as he has transferred the field in which he placed the bones and soil to trustees on behalf of Mr. Bromfield, his son-in-law, and that Mr. Bromfield will not permit him to enter such field for the purpose of executing the order of the Court, therefore the Court should decline to enforce its order.

Before noticing the general argument, I think it advisable to call attention to certain dates and facts as they appear in the evidence.

On the 6th of September in last year, Mr. Colthurst was warned by Mr. Adlam that he was doing an illegal act in removing these bones and soil into his field. Mr. Colthurst continued to remove them, and on the 3rd of October transferred by deed this field, with other property, to trustees for the use of his daughter and his son-in-law, Mr. Bromfield. What right had Mr. Colthurst to transfer to anybody this earth and these bones?

On the 10th of December the decree issued from this Court, which was the legal commencement of these proceedings. The articles in this suit were filed against Mr. Colthurst on the 9th of January, this year. On the 10th of January, a month after the commencement of these proceedings, the trustees leased to Mr. Bromfield (Mr. Colthurst's son-in-law, and one of cestui que trusts), this field among other property. It is to be observed that these trustees make no opposition to the order of the Court, but state in their affidavit that they have leased the property to Mr. Bromfield. On the 16th of May the Court made its order against Mr. Colthurst. On the 17th of May, Mr. Bromfield writes a letter to his bailiff, shewing clearly the concert between him and his father-in-law to set the Court at defiance. The monition is served on the 2nd of June, and on the 3rd of July what I must

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call a farce is acted by Mr. Colthurst and Mr. Bromfield, who, being in the same house, write letters to each other, evidently for the purpose of being laid before the Court, the father-in-law asking leave to enter the field and remove the bones, the son-in-law refusing him permission. The Court must be blind indeed to be deceived by such devices as these. Moreover it appears that Mr. Bromfield at one time consented to this removal if the costs were not pressed against Mr. Colthurst, and even since the cause was heard a few days ago, Mr. Bromfield has offered to allow a certain portion, but a certain portion only, of the soil and bones to be removed. This he has done, it is said, in consequence of a suggestion from me that I hoped this matter might be arranged out of Court. Apart from these considerations applicable to this particular case, let me now consider the general argument addressed to me by the counsel of Mr. Colthurst, the object of which is to shew that this Court has no longer any jurisdiction in this case. This argument, carried to its legitimate extent, was stated by the Court, and frankly admitted by the counsel for Mr. Colthurst at the hearing to amount to this, that if a man illegally removed from the consecrated soil of the churchyard all the bones therein interred, including those which, but a few hours before, the pious care of the sorrowing survivor may have reverently placed there, and if this man, before the law can be put in motion against him, transfer to his son-in-law, as in this case, or to any purchaser the land which has received this sacrilegious deposit, then the parishioners have no redress for the wrong which has been inflicted upon them, perhaps by the churchwarden who was solemnly bound to have protected them from it, then the case is without remedy; this Court, in whose custody the law has placed the church and churchyard, is powerless to enforce the law, to redress the wrong, or to punish the wrong-doer. I hope this is not—I do not believe it to be—the doctrine of our law; until better informed, I will not recognize it to be such. I adopt the language of my predecessor in this Court, Dr. Lushington, when it was suggested to him that Mr. Colthurst would, on this ground, refuse obedience to his decree, inasmuch as he could not comply with it. “It was hinted,” Dr. Lushington says in his judgment, which I am now required to enforce, “that by possibility an impediment might

be raised because the property is not now Mr. Colthurst's. I will not believe that the order of the Court will be so contumaciously resisted. Be that as it may, I shall not be alarmed by that intimation." Nor will I be so alarmed, or be deterred from the endeavour to execute this judgment by being told that the wrong-doer has, since he has done the wrong, deliberately put it out of his power to redress the wrong.

I am not satisfied that it was competent to Mr. Colthurst to transfer to trustees on behalf of his son-in-law and daughter this consecrated earth and soil. Mr. Colthurst could, I presume, only transfer what was his property; this soil, and these bones, were never his property. But if he could, which I do not believe, he must take the consequence of his act. The Court has ordered him to replace the bones of the parishioners, and the soil, so far as practicable, of the churchyard, into the parish churchyard from which he illegally took them away. He refuses to obey this order. It only remains for me to enforce, to the best of my power, the lawful order of my predecessor, to pronounce Mr. Colthurst in contempt, and to decree the usual process in such cases. I must, however, add, that I have referred to the various dates of the transactions, to the pleadings, to the admissions, to the correspondence in this case; and this Court must be wholly bereft of common sense if it doubted that Mr. Colthurst, and his son-in-law, the lessee of this land on which the bones have been placed, have been concerting measures together in order to evade the execution of the decree of this Court. I have not the least doubt that Mr. Colthurst's son-in-law would not oppose the wish of Mr. Colthurst to replace these bones, if he did not know that no such wish was entertained. Indeed, it is not denied that if the costs had been remitted, the bones would have been replaced. Be this as it may, this Court will protect, as far as it can, the right of parishioners to preserve undesecrated the bodies of those who have slept in peace in their churchyard. It is incumbent on me, therefore, to grant the prayer of the promoter, and to decree accordingly.

But having discharged my duty in delivering this judgment, I have still two remarks to which I desire to draw the attention of counsel. First, upon the general subject of alteration in churches and churchyards. If a faculty had been applied for, as it ought

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to have been in this instance, the objections of the parishioners would have been heard, the law would have been explained, the ordinary would have given proper directions with respect to the decent arrangement of the bones and the earth,—all the expenses of this suit would have been saved, and all the strife in the parish avoided. Secondly, with respect to this particular case (and here I would specially invite the attention of the counsel of Mr. Colthurst), I still think it possible that the necessity of sending Mr. Colthurst to prison for contempt of Court may be avoided. It has occurred to me that if both parties were to consent that the archdeacon or the rural dean should superintend the removal of the earth and bones back into the churchyard, any difficulties respecting the quantum of earth to be replaced, together with the bones, might be avoided; and also, by this intervention of a third person clothed with an official character, all feelings of bitterness between the parties might be removed, and the peace of the parish restored, and in that case the archdeacon or rural dean might certify to the Court generally that, in his opinion, the order of the Court had been sufficiently complied with.

I earnestly press this suggestion upon both parties in this case. If I receive proper intimation that it will be complied with, I will not decree the contumacy and contempt of the defendant to be formally recorded upon the minutes of the Court; and upon receiving the certificate from the archdeacon or rural dean I will dismiss the suit. In the hope that this suggestion may be adopted, I will suspend for six days the formal pronouncing the defendant to have been guilty of contumacy and contempt; but after the lapse of that time, if I receive no such intimation, I shall, without further proceeding in Court of any kind, pronounce the defendant contumacious and in contempt, and signify the same to the High Court of Chancery of England. (1)

Proctors for promoter: *Tebbs & Son.*

Proctors for defendant: *Toller & Sons.*

(1) The suggestion of the Court was acted upon. Within the time limited, a proper certificate was filed, and the suit was dismissed.



## [IN THE ARCHES COURT.]

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## DAUNT v. CROCKER AND OTHERS.

*Criminal Suit—Bell Ringing—Consent of Incumbent—Pleading—Notice of Objection—Rules (1867) 7, 11.*

In a criminal suit promoted by the incumbent for ringing the church bells, it is not sufficient to allege that the ringing took place without the consent of the incumbent; it must be alleged to have been against his express wish.

When the admission of pleadings in the Court of Arches is objected to, the notice to be filed under Rules 7 and 11 must state the grounds of objection.

This suit was brought by letters of request from the Chancellor of the diocese of Exeter, and was instituted by the Rev. Edward Synger Townsend Daunt, incumbent of the perpetual curacy of St. Stephen-by-Launceston, in the county of Cornwall, against William Crocker, carpenter, and eight others:—"For that they, some or one of them, on or about the 9th of September, 1866, unlawfully broke into the belfry of the parish church of St. Stephen-by-Launceston, and without lawful authority, and contrary to the express wish of the said Edward Synger Townsend Daunt, as perpetual curate of the said parish, rang the bells of the said church; and also at or about the same time removed the lock from the door of the said belfry of the said church," &c.

After reciting that by the laws ecclesiastical and constitutions ecclesiastical of the realm, the custody of the keys of the church and belfry is in the ecclesiastical rector, vicar, perpetual curate, minister, or incumbent of the church and parish; and that it is unlawful for any parishioner or other person to take the lock off the door of the belfry of the parish church, or otherwise to break into the belfry of, or to ring the bells belonging to, such church, without the leave or sanction of the minister thereof; the articles stated,

"4. That notwithstanding the premises, on or about the 8th of September, 1866, the said defendants, all or some one or more of them, *surreptitiously*, and without the leave or sanction of the said Reverend E. S. T. Daunt, obtained possession of the keys of the said parish church of St. Stephen-by-Launceston; and thereupon, on the 8th of September, or on the following morning, without the leave or knowledge of the said Reverend E. S. T. Daunt,

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all or some one or more of them, aided and abetted by the others, entered the said church, and proceeded through the same to the outer door thereof leading to the tower or belfry of the said church, and thereupon, without the knowledge or leave of the said Reverend E. S. T. Daunt, and without any just cause or lawful authority, forcibly removed the lock from off the said door leading to the said belfry or tower of the said church, in manifest breach and violation of the laws and canons ecclesiastical, which they were and are obliged to observe and obey.

“5. That on the 9th of September, 1866 (Sunday), the said defendants, after having entered the belfry of the said church, they or some one or more of them, without good cause allowed by the said Reverend E. S. T. Daunt, and without his consent, rang the bells belonging to the said church, or some one or more of the said bells, in manifest breach and violation of the laws and canons ecclesiastical, which they were and are bound to obey.”

The articles concluded with a prayer that the defendants should be admonished to refrain from like behaviour for the future, and be condemned in the costs incurred and to be incurred in the cause.

The case now came before the Court on objection by the defendants to the admission of the above (4th and 5th) articles.

SIR R. PHILLIMORE. In future, when the admission of pleadings is opposed, I shall require that the notice under Rules 7 and 11 (1) shall contain the grounds of objection intended to be taken against the admission. Such a course will be most convenient for all parties.

*Dr. Swabey*, for the defendants. The 4th article does not allege an ecclesiastical offence. Obtaining the keys of the church *surreptitiously* is not an ecclesiastical offence, and even if it were, it is not so laid in the letters of request or citation. Besides, in a criminal suit, it is not sufficient to allege that the offence was committed by some one or more of several persons.

(1) Rules and Regulations, 1867. whether or not he opposes the admission thereof.”  
 “7. The proctor for the party cited shall declare, by notice in writing to be left in the registry within eight days after his being furnished with a copy of the articles, libel, or plea, “11. The same time shall be allowed for the other proctor to declare whether the responsive plea is admitted or opposed.”

The 5th article contains no allegation, as the citation does, that the ringing of the bells was *against the express wish* of the incumbent; and does not show that an ecclesiastical offence has been committed. Bell-ringers are not required on every occasion to obtain leave from the incumbent before ringing. There may have been a custom in this parish to ring the bells on certain occasions: Burn's Eccl. Law, by Phillimore; "Bells," vol. i. p. 135. The 88th canon only directs the churchwardens not to allow the bells to be rung superstitiously, nor without good cause to be allowed by the minister of the place, and by themselves, but does not make it an ecclesiastical offence to ring the bells without obtaining such permission. In all the cases which have come before this Court there had been a request made to the ringers to desist, which they had refused to obey; *Nolan v. Bragg and Dowsett* (1); *Redhead v. Wait* (2); *Lee v. Matthews*. (3)

*Dr. Spinks, Q.C.*, and *Dr. Tristram*, for the promoter. As to the 4th article, the surreptitiously obtaining the key is not alleged as a distinct offence, but only as descriptive of the mode by which the defendants gained access to the belfry. As to the 5th article, it is sufficient to state that the ringing was without good cause allowed by the incumbent and without his consent: *Harrison v. Forbes and Sisson*. (4)

SIR R. PHILLIMORE. I shall order the words "surreptitiously, and" in the 4th article to be struck out; and in the 5th article the words "and against his express wish" to be introduced before the words "rang the bells belonging to the said church." I consider it my duty to remind the defendants that if they have been guilty of the offence alleged, I shall be compelled to admonish them to abstain for the future, and to condemn them in costs. If they have no good defence, they had better at once take steps to stop the proceedings in this suit.

Proctors for promoter: *Brooks & Du Bois*.

Proctor for defendants: *Waddilove*.

(1) The Prittlewell Case, Sept. 1840.  
Not reported.

(2) 6 L. T. (N.S.) 580.

(3) 3 Hagg. Eccl. 169.

4) 6 Jur. (N.S.) 1353.

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Nov. 22.

## THE NINA.

*Suit for Wages by British Subject against Foreign Ship—Admiralty Court Rules, 1859, Rule 10—24 Vict. c. 10, s. 10—Protest of Foreign Consul—Practice.*

*Port 357*  
*87D/23,42* The practice, enjoined by the 10th of the Admiralty Court Rules of 1859, of sending notice of the institution of a suit for wages against a foreign vessel to the consul of the state to which the vessel belongs, is not affected by the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), though

*Semble*, that there may be circumstances in which the Court would entertain such a suit without the sanction of the foreign consul.

The plaintiff, a British subject, shipped as mate on board a Portuguese vessel, and signed an agreement to be bound by the commercial law of Portugal, which requires that all disputes arising between masters and seamen should be submitted to the arbitration of the Portuguese consul residing in the country where the vessel may be. On the arrival of the vessel in England, the plaintiff arrested her, and instituted a cause of wages and disbursements against the owner in the Admiralty Court. In accordance with the 10th of the Admiralty Court Rules, 1859, notice of the suit was sent to the Portuguese consul in London, whereupon he entered a protest against the proceedings:—

On motion by the defendant, the owner of the vessel, the Court decreed that she should be forthwith released, and condemned the plaintiff in costs and damages.

*affa 2PC. 38*

THIS was a motion on behalf of Jaime Sabino Rangel, the owner of the *Nina*, to decree the release of the vessel which had been arrested at the instance of Charles La Blache, late chief officer on board her, in a suit for wages, disbursements, and compensation for wrongful discharge.

From the pleadings and affidavits filed on both sides, and which are fully commented on in the judgment, it appeared that in April, 1867, the plaintiff, who was a British subject having his home in Havana, shipped as mate on board the *Nina* then lying at Havana, and carrying the Portuguese flag. He signed the articles in the common form supplied to him, called a *Matricula* or Roll, made in conformity with the law of Portugal, and containing an express undertaking that he would submit himself to the provisions of the Commercial Code of that country, which provides that any dispute arising between the master of any Portuguese ship and any mate or seaman of such ship, shall be decided exclusively by the Portu-



guese Consul in or near the port in which the vessel may chance to be.

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The plaintiff alleged that the voyage was to be from Havana to Greenock, thence to a port in China, and thence to the Havana. The defendant on the other hand alleged that the voyage was to be to Greenock only.

On the arrival of the *Nina* at Greenock, the plaintiff left the vessel and caused her to be arrested by the Court of Session in Scotland in a suit instituted by him in respect of the same claims which he was seeking to enforce in this suit. Before the case came to a hearing the arrest was removed by the Lord Ordinary, and the plaintiff was condemned in costs, on the ground that he had lodged no answer within forty-eight hours' notice to him or his agents, of a certain petition filed by the then master of the *Nina*.

The *Nina* then sailed for and arrived at Cardiff, where the plaintiff caused her to be again arrested and instituted this suit.

In accordance with the 10th of the Admiralty Court Rules, 1859, notice of the suit was given to the Portuguese consul, Francisco Ignacio Van Zellar, residing in this country, whereupon the consul sent in a protest, the material portion of which is as follows:—

“1. I am consul-general in London of his Most Faithful Majesty, the King of Portugal.

“2. The above-named vessel *Nina*, proceeded against in this cause, is a Portuguese ship belonging to the Port of Macao, of which Jaime Sabino Rangel is the duly registered owner.

“3. The island of Macao is a Portuguese settlement, and is governed by Portuguese law.

“4. I have inspected the certificate of the matricula and roll under which the *Nina* was sailing when she arrived at Greenock in the month of June, 1867; and I say that such matricula or roll purports to have been duly executed, as required by Portuguese law, before Fernando de Gaver e Tiscar, the consul-general of his Most Faithful Majesty the King of Portugal at Havana.

“5. By the law of Portugal, the masters of all Portuguese vessels are required, before taking any officer or seaman to sea in a Portuguese vessel, to enter into a matricula or roll, setting forth the voyage upon which the ship is about to sail, and that the officers

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and seamen about to proceed in her have agreed to serve for that voyage; and such matricula or roll is by Portuguese law the only mode in which a binding engagement can be entered into between the master of a Portuguese ship and his officers and seamen; and the matricula or roll when entered is signed by the master, officers, and seamen.

"6. The matricula or roll under which the *Nina* so arrived at Greenock, purports to have been entered into for a voyage from Havana to Greenock only, and for no other voyage.

"7. The plaintiff in this action, Charles La Blache, has, by the said matricula or roll, submitted himself to the provisions of the Codigo Commercial of Portugal, by which the said Charles La Blache is restricted from taking any proceedings against the *Nina* or her master, and is required to submit any dispute or disputes that might be existing between them either to the Portuguese vice-consul at Glasgow or to myself.

"8. The said Charles La Blache has not, as I am informed and believe, submitted or attempted to submit any dispute or disputes existing between him and the master of the *Nina* to the Portuguese vice-consul at Glasgow; and the said Charles La Blache has not submitted or attempted to submit any such dispute to me, which I would have readily entertained had the said Charles La Blache so done.

"9. The said Charles La Blache being subject to the provisions of the Codigo Commercial, and not having taken the measures adopted thereby to settle his dispute with the master of the *Nina*, I respectfully submit that it is not within the jurisdiction of this honourable Court to entertain the claim of the said Charles La Blache; and, as the commercial representative of his Majesty the King of Portugal, I consider it to be my duty to respectfully and formally protest against the exercise of the jurisdiction of this honourable Court in or about the dispute existing between the said Charles La Blache and the master of the Portuguese ship *Nina*.

"F. I. Van Zellar."

The defendant then gave notice of motion, praying the Court to dismiss the cause and to condemn the plaintiff in costs and damages.

The questions raised on this motion turned on the construction to be put on the 10th of the Admiralty Court Rules, 1859 (1), taken together with the 10th section of the Admiralty Court Act, 1861. (2)

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Nov. 22. *Clarkson*, for the defendant, in support of the motion. The rule and practice under it still stand untouched by the statute. The legislature, in enacting that statute, must be held to have been aware of the existing practice of the Court, and to have approved it. It is clear from the case of the *Herzogin Marie* (3), that by the practice of the Court there is a discretionary jurisdiction in these cases, and the jurisdiction will not be exercised when the foreign consul protests. In the present case, there is the strongest ground for his protest. The process of the Court is being abused by the plaintiff.

*Lushington*, for the plaintiff. The rule requiring notice to the consul has, in fact, been complied with. His protest never had the power of a veto upon the Court exercising its jurisdiction; but weight was given to his protest in former times, because the jurisdiction of the Court was otherwise doubtful. The Court now has jurisdiction by the statute, and is bound to hear the case on the merits. The only reasonable purpose of the notice to the consul is to enable him to take proper measures to assist the shipowner in his defence. The notion that this Court has a discretionary jurisdiction; that is, a discretion to hear, or to refuse to hear, is totally anomalous, and it is submitted, is contrary to law. Upon the facts disclosed in the affidavits, the Court ought to allow the case to proceed. To decide the entire cause on affidavit, is contrary to the rules of the Court, and contrary to justice. [The following authorities were also referred to: the *Golubchick* (4);

(1) Rule 10 provides that "in a wages cause against a foreign vessel, notice of the institution of the cause shall be given to the consul of the state to which the vessel belongs, if there be one resident in London, and a copy of the notice shall be annexed to the affidavit."

(2) 24 Vict. c. 10, s. 10: "The High Court of Admiralty shall have jurisdiction over any claim by a sea-

man of *any ship* for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship," &c.

(3) *Lush*, 292.

(4) 1 Wm. Rob. at p. 147.

1867 the *Franz et Elise* (1); *Lloyd v. Guibert* (2); the *Milford* (3);  
 THE NINA. and the 17 & 18 Vict. c. 104, s. 191.]

*Cur. adv. vult.*

Nov. 23. SIR ROBERT PHILLIMORE. In this case the *Nina*, a Portuguese vessel, was arrested on the 21st of October in this year, by warrant from this Court, at the instance of Charles La Blache, who, in the affidavit which, according to the practice of this Court, precedes the issue of the warrant, described himself as "master mariner, late chief officer and navigator on board the Portuguese vessel *Nina*, now lying in the port of Cardiff." This person filed his petition on the 2nd of November, 1867; but before I mention that, there is one circumstance I wish to draw attention to. It appears in one of the documents before the Court, an exhibit, marked No. 3, attached to the affidavit of the master, that on the 26th of August this year, the plaintiff's solicitor at Greenock wrote a letter to the captain of the ship *Nina*, Francis Perez d'Almeida, which begins in this way:—"Greenock, 26th of August, 1867.—Sir,—Mr. La Blache, chief mate and navigator of your ship *Nina*, has instructed us to recover from you the sum of 450 dollars." That is dated the 26th of August, 1867, and refers to a proceeding in a Scotch court, which I will presently mention. The affidavit is dated the 21st of October, 1867. The plaintiff filed his petition on the 2nd of November, 1867, in this Court, in which he stated that he was a British subject; that on the 2nd of March last, by arrangement with Captain Almeida, the owner of the Portuguese vessel, the *Nina*, then at Havana, he shipped on board the *Nina*, under a charter for a voyage to the Clyde and port or ports in the United Kingdom; from thence to Hong Kong and Macao, there to load coolies for Havana, where the voyage was to terminate. In his petition he says that he so shipped as chief officer and commander, at the rate of 18*l.* a month, with a bonus of ten shillings a head on all coolies to be shipped at Macao, and with liberty to take with him his wife, child, and servant the entire voyage at the ship's expense. He states that the agreement, under which he shipped, was made before the consul-general of Portugal at

(1) 1 Marit. Law Cas. 155. (2) 33 L.J. (Q.B.) 241; in error, Law Rep. 1 Q.B. 115,

(3) Swab. at p. 366,



Havana, that he has performed his duty under the agreement in all respects, and the sixth paragraph contains the averment that "the plaintiff, whilst in command of the ship, made divers disbursements on account of the ship." He then avers that he has been wrongfully dismissed, and concludes as follows:—"By reason of the premises a large sum is due to the plaintiff for wages, disbursements, and compensation." In the petition, then, the plaintiff assumes a different character from that under which he appears in the letter of his Scotch solicitor, to which I have referred, and also in the affidavit which led the warrant for the arrest of the vessel. In this affidavit he claims, in the capacity of a mate, his wages, and in the petition he claims, as a master, wages, and disbursements. It was, of course, perfectly well known to his legal adviser that this Court had no power to entertain a suit for the disbursements of a mate, and this circumstance offers an obvious explanation of the different capacities under which he has claimed.

A long and full answer was put in on behalf of the owner and master, of which the most material points are, that the plaintiff shipped as a mate on board the *Nina*, that he is so described in the matricula or roll of that ship, that he entered into a special agreement to be bound by the commercial law of Portugal as to all disputes or questions which might arise between him and the captain; that, according to that law, no mate could take proceedings in a court of justice against the captain, without previously submitting the case to the arbitration of the Portuguese consul, and that he had not done so, though the consul was perfectly ready and willing to entertain the question. Here I may observe that the matricula itself, together with a translation of it, is annexed to the affidavit, and it entirely bears out the averments contained in the affidavit. There is a heading, "Special Obligations," and the seventh of the Special Obligations is this—"He must submit to everything foreseen and contained in the *Codigo Commercial* (Portuguese Commercial Code)." The roll is headed, "Portuguese Consulate-General, in the Archipelago of the Spanish Antilles, with residence at Havana. Articles and names of the crew of the Portuguese ship *Nina*, Captain Almeida, and of which is owner Jaime Sabino Rangel, proceeding on a voyage to Greenock, with passport from Macao, &c. At the office of the Consul-General of

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the Portuguese nation, in the Archipelago of the Spanish Antilles, in Havana, was matriculated and registered the crew of the Portuguese ship *Nina*, of which is Captain Almeida, whose signature herein I certify as true, and who declared this to be the true and original register of the said vessel." The affidavit goes on to state, moreover, that the present plaintiff had already arrested this ship in Scotland, which arrest, owing to his non-appearance in support of it, had been dismissed, with costs. All these averments are sustained by ample documentary evidence, and by a very important affidavit of the Portuguese consul in London, which I will read.

[His Lordship then read the protest above set out, and continued]:—

In these circumstances an application was made to me on behalf of the master and owner of the vessel to release this foreign ship from arrest, and to enable her to proceed on her voyage according to her charterparty, and to condemn the claimant in costs and damages. I thought the *primâ facie* evidence of the abuse of the process of this Court, and of the gross injury done thereby to a foreign subject by the detention of his vessel in this country, warranted me in calling upon the claimant in a summary manner to shew cause why the prayer of the foreign owner should not be granted. The matter came on last Tuesday for discussion in court. The counsel for the claimant prayed for further time to consider the statements and affidavits, and to reply to them, and I gave him time for that purpose. Yesterday, when the case was called on, an affidavit by the claimant was brought into court, of which it has been truly said that every averment contained in it, whether true or not, referred to matters which had been in the knowledge of the person making it when the suit was first instituted. It is difficult to believe that its late introduction in court on the morning of the hearing was unconnected with purposes of delay. I allowed it, however, to be read and commented upon, and have taken it into consideration in the judgment which I am about to give. It is chiefly remarkable for the entirely new version of the case set up by the plaintiff. He now says that the ship was a Peruvian and not a Portuguese ship, and attempts to set up a verbal agreement which is to supersede the written agreement, or

the matricula which he admits to have signed. He does not deny that he arrested the ship under process of the Scotch Court on the 5th of September, or that the suit was dismissed with costs against him. He represents that his wife's health compelled him to leave Scotland, that he had no notice of the proceedings in the Scotch Court; in fact, that that Court acted with flagrant injustice towards him. He does not however deny, in this affidavit, that the document which he signed did contain an express undertaking that he would submit himself to the Portuguese law. A suggestion was, indeed, made by counsel that the copy matricula is the only document before the Court without signature; but it is not denied that the original is, according to the law of Portugal, in the custody of the Portuguese consul at Havana, and, as I have said, that it contains the signature of this person.

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One word as to the last device—for so I must designate it—of the plaintiff; a device not thought of when he was before the Scotch Court—namely, that the vessel is a Peruvian vessel. I cannot but think that this total variation from the original statement to be found in every document before the Court, and in every averment hitherto made by the plaintiff—viz., that this vessel, sailing under a Portuguese flag, and hitherto described as a Portuguese vessel—that this total variation arises out of a desire to take the case out of the application of a principle which has hitherto governed this Court in the matter of suits for wages by foreign seamen. Be my suggestion, however, right or wrong, I am satisfied that I ought not to allow the plaintiff so entirely to alter the grounds upon which his claim was instituted, or so to change the position on the strength of which he obtained the warrant of this Court.

It has been most strenuously urged upon me by the counsel for the plaintiff that I am nevertheless bound to entertain this suit, and to allow the plaintiff to continue the arrest upon this foreign vessel, which is thereby deprived of fulfilling the obligations of her charter-party. It is not quite, but very nearly, maintained that I have really no discretion to exercise in this matter. The attention of counsel was drawn to the various well-known cases which established the proposition that when a seaman sues a foreign ship in this court for wages, the Court usually requires the consent of the

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foreign consul before it entertains the suit; and the 10th rule of court, framed in 1859, expressly provides that—"in a wages cause against a foreign vessel, notice of the institution of the cause shall be given to the consul of the state to which the vessel belongs, if there be one resident in London, and a copy of the notice shall be annexed to the affidavit." The authority of these cases, and the rule founded on them was said to be obsolete; indeed, never to have been founded on strict law, and at all events to be entirely abrogated by the 10th section of the 24 Vict. c. 10—the act which enlarges the jurisdiction of this Court. I find no words in that section which limit the discretion hitherto claimed and exercised by this Court. I know no rule of law applicable to the construction of statutes, which, in the absence of express words, would give this effect to the section. It is to be observed, also, that the case of the *Franz et Elise* (1) has been decided according to the old practice, subsequently to the passing of this statute, and also that a similar argument, used I believe by myself, arose out of s. 191 of the Merchant Shipping Act, 1854, and was expressly overruled by the judge in March, 1861. (2) I hold, therefore, that I have the same discretion as my predecessor in this chair possessed, in suits of this description. I am sure that it is most expedient, upon grounds of international comity, that the Court should possess this discretion. It is no unfrequent cause of complaint on the part of foreign states that the law of England does not in general accord, in British ports, to foreign consuls, that reasonable authority in mercantile transactions between the seamen and masters of their own ships, which is almost invariably accorded to foreign consuls by the law of other states. I am desirous, however, of not being misunderstood. I do not say that this Court will never entertain a suit of this kind without the sanction of the foreign consul. Each case may depend upon its own circumstances, and I entirely agree with the opinion expressed on this question by Dr. Lushington, in the *Golubchick*. (3) But I do say that I will not entertain this suit, in which the plaintiff has shipped on board a Portuguese vessel, with a Portuguese flag and papers, as mate, and has deliberately bound himself by a written instrument, duly entered into,

(1) 1 Marit. Law Cas. 155. (2) See the *Herzogin Marie*, Lush. at p. 293.

(3) 1 Wm. Rob. at p. 147.



before a Portuguese consul to conform to the law of Portugal, which requires him to submit to the arbitration of the Portuguese consul, who is here ready and willing to discharge his duties. I do say I will not entertain this suit contrary to the protest of the Portuguese consul, at the instance of a plaintiff who, from his first affidavit, which led the warrant, to his last affidavit, filed the other day, has continually varied all the material statements of his case, and who has already been condemned in a Scotch court in costs and damages for the arrest of this very vessel. I agree with Mr. Lushington that a more regular course of proceeding should have been adopted to bring this question before the Court, and I shall expect the more regular course to be adopted in other cases of the kind. But having regard to the peculiar circumstances of this case, which I have stated, I will not be deterred by any technical reasons from doing justice now in this matter. I think the process of the Court was abused originally, in the arrest of this foreign ship, and I decree that she be forthwith released, and I condemn the plaintiff in costs and damages incident to these proceedings. (1)

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Attorneys for plaintiff: *Cotterill & Sons.*

Proctors for defendant: *Clarkson, Son, & Cooper.*

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THE HANNIBAL.  
THE QUEEN.

Nov. 12.

*Collision—Salvage—25 & 26 Vict. c. 63, s. 33.*

A collision occurred between two vessels, A and B. A was in tow of a steam-tug; the tug afterwards rendered assistance to B. B was found solely to blame for the collision:—

*Held*, that the tug's right of salvage remuneration was not affected by 25 & 26 Vict. c. 63, s. 33, which makes it the duty of ships mutually to assist each other after a collision.

THESE were two suits; one by the *Queen* against the *Hannibal*, in respect of a collision: the other by the tug *Retriever* which was towing the *Hannibal*, for salvage services afterwards rendered by her to the *Queen*.

(1) This decree was affirmed on appeal by the Privy Council, Feb. 4th, 1868, except as to the costs and damages, which part of the decree was struck out.

(2 R. C. 38)

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The circumstances were shortly as follows :—On the 14th of December, 1866, the *Hannibal*, in tow of the steam-tug *Retriever*, came in collision when near the entrance of the Queen's Channel with the steam-ship *Queen*, bound for Whitehaven with a general cargo and about forty passengers. The *Hannibal* and the *Queen* continued locked together for some time, and nearly all the crew of the *Queen* and a number of passengers, made their escape to the *Hannibal*. The *Retriever* having towed the *Hannibal* clear of the *Queen*, proceeded to the assistance of the *Queen*, and after considerable difficulty, succeeded in towing the *Queen* to Liverpool and placing her safely alongside the Prince's Landing Stage. It was alleged, that but for the assistance rendered by the *Retriever* in towing the *Hannibal* clear of the *Queen*, the latter would have been sunk by the *Hannibal*; and that but for the assistance of the *Retriever*, after the *Hannibal* was towed clear, the *Queen* would inevitably have gone ashore on some of the banks by which she was surrounded, to the certain destruction of the vessel and all on board; and that no steamer besides the *Retriever*, able to render assistance, was near.

In accordance with an order which had been made by the learned judge, the two causes were heard together, and occupied the Court and Trinity Masters four days, viz., the 7th, 8th, 9th, and 11th of November.

*Brett, Q.C.*, and *Lushington*, appeared for the *Hannibal* and the *Retriever*.

*Deane, Q.C.*, and *Butt*, for the *Queen*.

It was admitted that the *Queen* had received certain damage in the collision; and it was agreed that the evidence in the collision suit should be taken first, and should be used in the salvage suit.

On the 11th of November, the *Queen* was pronounced solely to blame for the collision.

*Brett, Q.C.*, and *Lushington*, for the salvors, submitted that the fact that the *Retriever* was towing the *Hannibal* did not affect her right to salvage reward for services rendered to the *Queen*: the *Annapolis*. (1)

*Deane, Q.C.*, and *Butt*, for the *Queen*, referred to the 25 & 26

Vict. c. 63, s. 33. (1) The tug and the vessel towed are to be considered as one: the *Cleadow*. (2) The tug cannot be entitled to salvage reward for merely performing a duty.

*Brett, Q.C.*, in reply. The statute cannot apply to the case of a towing vessel. The *Retriever* was under a contract to tow the *Hannibal*, and was under no obligation to assist the *Queen*. The *Cleadow* (2) was reviewed in the *Independence*. (3)

*Cur. adv. vult.*

Nov. 12. SIR ROBERT PHILLIMORE. The Court yesterday pronounced the *Queen* to blame for the collision with the *Hannibal*, which at the time of the collision was being towed by a tug called the *Retriever*. The *Retriever* afterwards came to the assistance of the *Queen*, the wrong-doing vessel, and towed her into Liverpool, a distance of about eleven miles from the scene of the collision.

The *Retriever* now appears in Court as a salvor, and claims salvage remuneration for her services to the *Queen*.

I put a question to the Trinity Masters as to whether the *Queen*, her cargo, or her crew, were in danger? They replied that "there was danger, but not great danger, to the *Queen*." It occurred to me, however, to suggest to counsel that, previously to determining whether any and what salvage was due to the *Retriever*, there arose a question whether, under the particular provision contained in the 33rd section of 25 & 26 Vict. c. 63, the rendering of salvage in this instance had not been taken out of the category of a voluntary service, and become the mere discharge

(1) 25 & 26 Vict. c. 63, s. 33:—  
"In every case of collision between two ships, it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any), such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision. In case he fails so to do, and no reasonable excuse for such failure is

shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the Principal Act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended."

(2) Lush. 158.

(3) Lush. 270.

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of a positive duty, cast by the statute upon the salvors, for the neglect of which they would have been punishable.

As the interpretation of this clause had not been the subject of any judicial decision, I deferred my judgment till this morning.

The clause, it is well known, was introduced into the statute by Lord Kingsdown, a name never to be mentioned by me without a feeling of the deepest respect for one of the wisest, most able, and most upright judges who ever administered justice in this or any other country. He introduced it in consequence of some case or cases which came within his cognizance while sitting in the Judicial Committee of the Privy Council, in which, after a collision, one ship had sailed away and left the other to perish. The clear object of the clause is to visit with deserved penalty and punishment such a transgression. But it could not have been the intention of the framer of the clause to prevent a vessel which had been an innocent sufferer, from obtaining a salvage reward in this Court, to which, upon the ordinary principles of law it would have been entitled, because it had been unjustly injured in the collision which preceded and rendered necessary the salvage service.

In this case, indeed, the tug itself did not come into collision, but the ship which it towed; and it has been argued that the case of a towing ship is a *casus omissus* from the statute, but I am not of this opinion. I think the *Retriever* is entitled to salvage remuneration, but having regard to all the circumstances, to one of a very moderate amount.

I award 40*l.*, with costs. (1)

Attorneys for the *Queen*: *Gregory & Rowcliffes*.

Proctors for the *Hannibal*: *Pritchard & Sons*.

Proctors for the *Retriever*: *Jennings & Son*.

(1) The learned judge announced evidence; but that the Court and that for the future in causes of collision and salvage, heard before the Trinity Masters, he should not sum up the Trinity Masters would retire and, on their return, the judgment of the Court would be given.



## THE GENEROUS.

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Jan. 28.

*Salvage—Appeal from Award of Justices—17 & 18 Vict. c. 104, s. 464; 25 & 26 Vict. c. 63, s. 49—“Sum in Dispute”—Fresh Evidence—Practice.*

The provision in the 49th section of the 25 & 26 Vict. c. 63, extending the jurisdiction of the justices in salvage cases to all cases in which the value of the property saved does not exceed 1000*l.*, merely extends and applies the regulations in the 464th section of the 17 & 18 Vict. c. 104, respecting appeals for claims not exceeding 50*l.* to cases in which the value of the ship and freight is under 1000*l.*; but does not make the appeal depend on the claim being for 50*l.* and upwards, and the value of the property saved being 1000*l.* and upwards.

Salvors claimed before the justices 55*l.* under a written agreement, 5*l.* of which was admitted to be due to them:—

*Held*, that the “sum in dispute” exceeded 50*l.*

Circumstances considered under which the Judge of the Admiralty Court will exercise his discretion as to the admission of fresh evidence on appeal from justices in salvage cases.

THIS case came before the Court on appeal by the defendants, the owners of the brig *Generous*, from an award made by two justices of the peace for the borough of Great Yarmouth, in a cause of salvage for services rendered to that vessel by George Gooch and eleven others by means of their yawls *Storm* and *Breeze*, in Yarmouth Roads, on the 4th of February, 1867. The salvors claimed 55*l.*—namely 5*l.* which had been agreed on for recovering an anchor, which the *Generous* had lost in the act of bringing up, and 50*l.* for taking the vessel into harbour—by virtue of an agreement signed by the master, which was in the following terms:—

“Yarmouth, Feb. 5.

“I agree to pay the sum of 5*l.* for getting the anchor on board of the brig *Generous*, of Sunderland, and if the ship come into Yarmouth harbour, I will give the sum of 50*l.* to put her in safety.

“ALEX. ROBINSON,

“Master, brig *Generous*.”

The validity of this agreement was disputed, but the justices admitted it and awarded 53*l.* 11*s.*, being the sum of 55*l.* less 1*l.* 9*s.* for towage. The agreed value of the *Generous*, her freight and cargo, was 900*l.*

The evidence given before the magistrates, and before the

1868 Court on appeal, is sufficiently stated and commented on in the judgment.

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The principal questions raised on this appeal turned on the construction to be put on the following sections of the Merchant Shipping Act, 1854, and the Merchant Shipping Amendment Act, 1862.

17 & 18 Vict. c. 104, s. 464:—"If any person is aggrieved by the award of such justices or such umpire as aforesaid, he may in England appeal to the High Court of Admiralty of England . . . but no such appeal shall be allowed unless the sum in dispute exceeds 50*l*."

25 & 26 Vict. c. 63, s. 49:—"The provisions contained in the eighth part of the principal act for giving summary jurisdiction to two justices in salvage cases and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows: (that is to say) (1) Such provision shall extend to all cases in which the value of the property saved does not exceed 1000*l*. as well as to the cases provided for by the principal act."

Jan. 21. *Lushington* for the respondents (the salvors), submitted that the Court had no jurisdiction. The agreed value of the property saved was under 1000*l*., therefore under the 49th section of the Merchant Shipping Amendment Act, 1862, when read with the 464th section of the Merchant Shipping Act, 1854, an appeal in this case is excluded. Moreover, the 5*l*. was agreed upon and admitted: the "sum in dispute" therefore did not exceed 50*l*. within the meaning of the 464th section: the *Andrew Wilson*. (1)

*Brett, Q.C.*, and *Clarkson*, contra. The object of the 49th section of the Amendment Act, was merely to extend the jurisdiction of the justices to all cases in which the value of the property saved does not exceed 1000*l*. The operation of the 464th section of the principal act giving an appeal where the sum in dispute exceeds 50*l*., has not been affected by the Amendment Act. The *Andrew Wilson* (1) was overruled by the *Mary Anne*. (2)

THE COURT overruled the objection, and ordered the cause to proceed.

(1) *Brow. & Lush.* 56. *gjm*  
*MS 474*

(2) *Brow. & Lush.* 334.

On the master of the *Generous* being called, *Lushington* objected that as he had been examined before the magistrates, his further evidence could not be heard.

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*Clarkson* contended that the Court ought to hear the whole case.

*Lushington* referred to the *Flying Fish*. (1)

THE COURT held that the witness could be examined only as to matters which had arisen since the case was heard before the magistrates.

The cause was then heard, and some further evidence given.

*Cur. adv. vult.*

Jan. 28. SIR ROBERT PHILLIMORE. This was an appeal from an award of salvage made by two justices of the peace for the borough of Great Yarmouth, in the case of the brig *Generous*. This vessel, of 159 tons register, with a crew of seven hands all told, laden with coals and coke, and bound for Oporto, came into Yarmouth Roads, where she dropped anchor on the 4th of February, 1867. The anchor which she dropped was her port anchor, and in consequence of some accident, whether caused by the state of the weather or not, the chain of the anchor parted, and she thereupon dropped her starboard anchor. In the afternoon of this day a man of the name of Gooch, who represents the yawls *Storm* and *Breeze* in this case, tendered his services to the *Generous*. According to his statement the brig was in a leaky state, and unfit to proceed to sea; and her crew had refused to proceed further with her. The fair result of the evidence upon this point seems to be that certain repairs were necessary, and that the crew did refuse, as stated. The evidence of the master of the brig, a witness on behalf of the *Generous*, is on this point as follows:

“They (the crew) said they would not proceed any further out of the roads with the ship, but they did not say they would refuse duty.”

The master, in answer to questions put by me at the hearing, stated that the ship was in a bad state, that the crew refused to go out of the roads, and that the weather was bad.

According to the statement of the *Generous*, she required no

(1) *Brow. & Lush*. 436.

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salvage assistance. It is clear, however, that with her consent and by her desire the *Storm* and *Breeze* recovered the port anchor, and put it on board the brig. On the next day, the 5th of February, it appears that the master of the *Generous* and Gooch proceeded to Great Yarmouth, and there had an interview with Captain Rivers, the agent of the club in which the *Generous* was insured, but no agreement was come to with respect to the sum to be paid for putting the anchor on board. Captain Rivers sent off his agent, Mr. Race, to survey the *Generous*. Gooch was offered by Mr. Race what he calls "the job of taking him off to the *Generous*;" and, as he says, he (Gooch) undertook to do so in the course of the afternoon. He did not do so, however; and the next morning, the 6th, Mr. Race engaged a steam-tug to tow the *Generous* into harbour, which was done.

In the meanwhile, on the afternoon of the 5th, Gooch, with some of his men, went with the master of the *Generous* to a public-house at Gorleston, where the master wrote out the following agreement, into giving which, it was asserted, the master was cajoled.

[His Lordship read the agreement above set out.]

Gooch alleges that, in consequence of this agreement, he went out, prepared to bring the brig in into harbour, when the steam-tug was sent out to tow the vessel in, which they did not oppose, but gave assistance to the steam-tug in making fast the tow-line, and in other ways. The agreement was repudiated by the agent for the *Generous*. Gooch and his men went before the justices, and claimed the fulfilment of it. The justices awarded to Gooch and his men "the sum of 53*l.* 11*s.* (being the said sum of 55*l.* less the sum of 1*l.* 9*s.*, for the towage of the said vessel into and up the said harbour), and the sum of 1*l.* 10*s.* for their costs and expenses, and ordered that the said owners should at the same time pay the costs of the said adjudication and award, amounting to the sum of 4*l.* 3*s.* 6*d.*"

Evidence has been given before this Court, by the master of the *Generous*, that he was bribed by a promise of 10*l.* to sign this agreement. This is denied by Gooch; but the Court is disposed to believe the evidence of the master on this point. It is not necessary to go into details; but the whole circumstances attending the manufacture of this agreement are fraught with suspicion.



I am of opinion that, having regard to these circumstances, the magistrates erred in sustaining this agreement as binding upon the owners of the *Generous*. I think, however, according to the principles which have uniformly actuated this Court in matters of this description, that a salvage service was rendered by Gooch and by his men, both in recovering the anchor and in other ways—the state of the brig and of the crew, to which I have already adverted, must be borne in mind. I shall reverse the sentence of the magistrates, and award 30*l.*, and I shall make no order as to the costs before this Court.

Questions of some importance, with respect to the construction of certain sections of the Merchant Shipping Acts, and with respect to the practice of this Court as to the admission of new evidence in a case of appeal before it, were raised at the hearing; and in order to consider them the Court reserved its judgment. First, it was contended that by the joint operation of s. 464 of 17 & 18 Vict. c. 104, and s. 49 of 25 & 26 Vict. c. 63, the Court had no jurisdiction in this case, inasmuch as it appeared upon the face of the proceedings that the value of the ship, freight, and cargo was under 1000*l.* I overruled this objection at the hearing, and upon reflection I adhere to the opinion which I then expressed. The true construction of s. 49 of 25 & 26 Vict. c. 63, when read with s. 464 of the former statute, appears to me to be that it merely extends and applies the existing regulations, made with respect to appeals for claims under 50*l.*, to cases in which the value of the ship and freight is under 1000*l.*: it does not make the appeal depend on two conditions, viz. that the claim shall be for 50*l.* and upwards, and that the value of the ship and property saved shall be 1000*l.* and upwards. It did not mean to enact that if the magistrates awarded 500*l.*, or 600*l.*, or 700*l.*, or possibly more, out of a property of 1000*l.*, the owners should have no right of appeal.

The jurisdiction of the Court was also objected to on the ground that according to the true construction of ss. 460 and 464 of 17 & 18 Vict. c. 104, “the sum in dispute” did not exceed 50*l.*, and the cases of the *Andrew Wilson* (1) and the *Mary Anne* (2) were referred to. In the case of the *Andrew Wilson* (1), which should

(1) *Brow. & Lush.* 56. *Spencer*

(2) *Brow. & Lush.* 334.

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be taken first, my learned predecessor, Dr. Lushington, first recited the words of the statute, and then said: "There undoubtedly is some obscurity in these words, 'the sum in dispute,' but I am of opinion that they do not mean the sum awarded by the justices. If the legislature had so intended merely to refer to the sum awarded by the justices, I cannot but think that the section would have been differently worded, as that no such appeal should be allowed unless the sum awarded should exceed 50*l*. I am of opinion, therefore, that I am at liberty to review the decision of the magistrates in this case."

The *Mary Anne* (1) is not considered by the Court to overrule the *Andrew Wilson*. (2) There Dr. Lushington said: "In the case of the *Andrew Wilson* I held that the 'sum in dispute' was not the sum awarded by the justices, but the sum claimed by the salvors. Now, I lay out of my consideration all loose expressions which may have occurred in conversation between the master of the *Mary Anne* and the salvors; but it is clear that the salvors made a formal demand in writing for 40*l*. The plaintiffs, by making this demand, may not absolutely have debarred themselves from suing for a larger sum; but their demand from the justices was not for a sum exceeding 50*l*., but for a sum not exceeding 200*l*. I think this must be taken to have reference to the previous claim of 40*l*., and therefore to constitute 'the sum in dispute.' The Court accordingly cannot entertain the appeal."

When the judgments in these cases are examined they do not, as was suggested, conflict with each other. In the first case Dr. Lushington was of opinion, upon the facts, that the sum claimed before the magistrates was above 50*l*., and in the second, upon the facts, that it was less than 50*l*.

In the case now before the Court the sum claimed before the magistrates was more than 50*l*.; it was 55*l*. The Court is therefore not debarred from exercising its jurisdiction, on account of the amount of the sum which is claimed.

A question was also raised as to the duty of this Court, sitting as an appellate court, with respect to the reception of evidence tendered for the first time before it. In the case of *The Thomas Wood* (3), Dr. Lushington said: "Although in cases of appeal the

(1) *Brow. & Lush.* 334. (2) *Brow. & Lush.* 56. (3) 1 *Wm. Rob.* at p. 19.

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decision of appellate courts is generally guided by the evidence produced before the original tribunal, the practice has been different in this court; and in the first case of this kind, which came before Lord Stowell, that learned judge admitted an additional affidavit to be brought in, notwithstanding the objections that were raised against its reception at the time, founded on the act of parliament that has been referred to in the present instance. The practice of the Court, therefore, is not opposed to the admission of fresh evidence."

The practice of the Court, therefore, at the time when this judgment was delivered, permitted the introduction of new evidence in these cases. But in subsequent instances, it appears to have been the opinion of the Court that this permission ought to be placed under considerable restrictions. There is no difference in principle, I may observe, between appeals to this Court from the decisions of magistrates, and appeals from the report of the registrar and merchants. My learned predecessor, during the course of his long administration of justice in this court, became quite sensible of the evil which ensued from allowing indiscriminately the admission of new evidence.

In *The Glenmanna* (1), which was an appeal from the registrar's report, Dr. Lushington said, with reference to admitting new evidence: "Under these circumstances the case came before the Court, and the first observation that I have to make is, that none of this evidence was produced before the Registrar and merchants, and therefore, in truth, I am called upon to decide a new case, and not simply whether the Registrar and merchants did right upon the facts before them. I very much question whether this is a regular or competent course of proceeding. It deprives the Court of the advantage of the opinion of the Registrar and merchants upon the evidence. Some additional affidavits may be admissible, but it is an irregularity which for the future I shall not permit, to withhold evidence at the reference, and make a new case before the Court."

In almost the last case which I argued when I was at the bar, that of the *Flying Fish*, before the Privy Council (2), an objection was taken by me to the admission of such new evidence, and I cited

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(1) Lush. at p. 122.

(2) Brow. & Lush. 436.

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the new rules as restraining the power of the Court in the admission of new evidence. The Privy Council, however, said: "Their Lordships do not think that these rules have at all the effect of restraining the power of the judge, or of fettering his discretion as to the admissibility of fresh witnesses upon these occasions, a discretion which it is unnecessary to say must always be exercised with great caution, and with a careful regard to the peculiar circumstances of each case." (1)

I must take this decision of the Privy Council as my guide in future cases; the practice of the Privy Council, I may observe, is, with very rare exceptions, to refuse the introduction of new evidence, unless the facts which it is to support are shewn upon affidavit to be "noviter perventa" to the party applying for their introduction. In the case before me, I did admit, though reluctantly, some new evidence to be adduced; but in all future cases, I wish it to be understood that the Court will require good reason to be shewn, why evidence not produced before the court below should be introduced in this Court, and will always exercise a discretion, according to the circumstances of the case, on this subject; entertaining a strong opinion, upon general principles which are too obvious to require to be stated, that such discretion should be exercised with great reserve and caution.

Proctors for appellants: *Clarkson, Son, & Cooper.*

Proctors for respondents: *Shephard & Skipwith.*

(1) Brow. & Lush. at p. 442.



## THE FERONIA.

1863

Feb. 4.

*Right of Master also part Owner to Payment of Wages and Disbursements out of Freight—Mortgagees in Possession—24 Vict. c. 10, s. 10; "disbursements made by him;" Tobacco and Slops for Seamen; Items unpaid; Bill of Exchange—Practice.*

The master's maritime lien on the freight for his wages and disbursements in priority to the claims of the mortgagees is not affected by the fact of his being also part owner of the vessel.

Disbursements made by the master include all proper expenditure made by him upon the ship, whether the particular articles be obtained by immediate or promised payment; therefore, liabilities incurred by him for articles expended for the benefit of the ship are to be considered as disbursements, and will be allowed where the Court has a fund in its custody legally liable for all necessities.

In a suit by a master, who was also part owner, against ship and freight for wages and disbursements, the Court confirmed the registrar's report allowing the master's claim, in priority to the mortgagees in possession, for his wages and the following disbursements, viz.:

1. For tobacco and slops supplied to seamen, who afterwards deserted, on the ground that these being a part of seamen's wages, the master was entitled to be reimbursed for them, notwithstanding the fact that he might have made a small profit in supplying them;

2. For certain items which had not been paid, but which the registrar allowed, with a recommendation that no order for the payment thereof be made until the master deposited in the registry vouchers for the payment, or gave satisfactory evidence that the accounts had been paid;

3. For a bill of exchange drawn by the master, of the dishonour of which he had received no notice—and for which it was contended he was therefore no longer liable—on the ground, that as the whole principle of notice of dishonour is founded upon the notion of benefiting the drawer, and as in this case the drawer had not only not been injured by the absence of notice, but had taken no such objection as a defence, it was not competent to the defendants (mortgagees in possession, representing the acceptor) to set up an objection on the ground of want of notice, and to contend that the drawer was no longer liable on the bill.

THIS case came before the Court on objection to the registrar's report in a cause of wages and disbursements, instituted by Robert Hutchinson, part owner and late master of the *Feronia*, against that vessel and her freight.

It appeared that Hutchinson, who had been in the employ of William Klingender, the principal owner and ship's husband of the *Feronia*, for several years, was in May, 1861, appointed to take command of that vessel. His accounts with Klingender were

1868 settled up to the 31st of December, 1864, and it was in regard to  
 THE FERONIA. accounts subsequent to that time that this suit was brought.

On the same day on which his accounts had been settled, Hutchinson purchased from Klingender 8-64th shares of the *Feronia*, and about the same time John Hughes and Robert John Rickarby purchased respectively 8-64th and 4-64th shares of the vessel; the remaining 48-64th shares were owned by Klingender. In January and February, 1865, the vessel underwent considerable repairs at Liverpool, and on the 3rd of March sailed with a general cargo, under the command of the plaintiff, for Melbourne. Having discharged her cargo, she sailed with some passengers to Point de Galle, thence to Trincomalee, where the plaintiff took in a cargo of cotton, and arrived at Liverpool in July, 1866. Meanwhile, Klingender had mortgaged his share of the ship, as well as a portion of the homeward freight. No appearance was given in the cause on behalf of Klingender, but separate appearances were entered: 1st, for the National Bank of Liverpool, Limited, as the mortgagees by transfer of Klingender's 48-64th shares, and as mortgagees in possession of the vessel; 2ndly, for Mr. Rickarby, as a part owner and mortgagee of the homeward freight; 3rdly, for Messrs. Swire, as other mortgagees of the homeward freight; 4thly, for Mr. Hughes, as part owner. Under these circumstances, the plaintiff's claim was referred to the registrar, assisted by merchants, to report the amount due thereon. On the 12th of August, 1867, the registrar reported due to the plaintiff the sum of 1087*l.* 8*s.* 5*d.*, according to the following schedule annexed to the report:—

## SCHEDULE.

|                                                                                     | CLAIMED. |    |    | ALLOWED. |    |    |
|-------------------------------------------------------------------------------------|----------|----|----|----------|----|----|
|                                                                                     | £        | s. | d. | £        | s. | d. |
| 1. Wages from 1st January, 1865, to 1st September, 1866, at 300 <i>l.</i> per annum | 500      | 0  | 0  | 500      | 0  | 0  |
| 2. Cabin allowance for 16 months, at 7 <i>l.</i> per month                          | 117      | 12 | 0  | 117      | 12 | 0  |
| 3. Passage-money due to the master throughout the voyage                            | 286      | 13 | 4  | 286      | 13 | 4  |
| 4. Expenses at Liverpool, and throughout the voyage                                 | 18       | 0  | 0  | 18       | 0  | 0  |
| Total carried forward                                                               | 922      | 5  | 4  | 922      | 5  | 4  |

## SCHEDULE—continued.

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|                                                                                                                                | CLAIMED, |    |    | ALLOWED, |    |    |
|--------------------------------------------------------------------------------------------------------------------------------|----------|----|----|----------|----|----|
|                                                                                                                                | £.       | s. | d. | £.       | s. | d. |
| Brought forward .. ..                                                                                                          | 922      | 5  | 4  | 922      | 5  | 4  |
| 5. Board wages for 14 weeks and 5 days, at 21s. per week .. ..                                                                 | 15       | 9  | 0  | 15       | 9  | 0  |
| 6. Sundry petty expenses for 2 months ..                                                                                       | 10       | 0  | 0  | 10       | 0  | 0  |
| 7. Ten days' double pay .. ..                                                                                                  | 16       | 10 | 0  | 16       | 10 | 0  |
| 8. Cash advanced by master on ships' account at Trincomalee .. ..                                                              | 31       | 11 | 8  | 31       | 11 | 8  |
| 9. Tobacco and slops supplied to seamen who afterwards deserted .. ..                                                          | 38       | 1  | 10 | 38       | 1  | 10 |
| [Items 10 to 17, which were disallowed, are not material to this report.]                                                      |          |    |    |          |    |    |
| 18. James Scott, for provisions at Queens-town .. ..                                                                           | 35       | 0  | 1  | 35       | 0  | 1  |
| 19. A. Reed and Co., for commission on homeward charter .. ..                                                                  | 135      | 4  | 11 | 135      | 4  | 11 |
| 20. Glen and Wild, for stores received at sea .. ..                                                                            | 4        | 9  | 2  | 4        | 9  | 2  |
| 21. J. Mullins, balance of bill for discharging cargo .. ..                                                                    | 74       | 15 | 0  | 74       | 15 | 0  |
| 22. J. Hughes, master porter, balance of bill .. ..                                                                            | 2        | 11 | 0  | 2        | 11 | 0  |
| 23. One-sixteenth share of the net freight earned by the ship between the 1st January, 1865, and the 1st September, 1866 .. .. | ..       | .. | .. | ..       | .. | .. |
|                                                                                                                                | 1,995    | 6  | 4  | 1,285    | 18 | 0  |
| DEDUCT                                                                                                                         |          |    |    |          |    |    |
| Cash paid by Mr. Klingender, the ship's husband, for cabin stores .. .. £109 11 11                                             |          |    |    |          |    |    |
| Ditto ditto for master .. .. 88 17 8                                                                                           |          |    |    |          |    |    |
|                                                                                                                                | 198      | 9  | 7  | 198      | 9  | 7  |
| £                                                                                                                              | 1,796    | 16 | 9  | 1,087    | 8  | 5  |

With interest thereon until paid as follows, viz.:—at the rate of 4 per cent. per annum from the 12th August, 1867, to the 26th August, 1867, and from the latter date at the rate of 5 per cent. per annum, except when the bank rate exceeds 4 per cent., and then at the rate of 1 per cent. per annum above such bank rate.

The reasons appended to the report by the registrar, were, so far as material to this report, as follows:—

“It appeared from the evidence of the master and of Mr. Klingender—and indeed there was no dispute on the point—that the agreement between the master and Mr. Klingender was, that his wages were to be at the rate of 300*l.* per annum, 7*l.* a month for cabin allowance whilst the vessel was absent from England, and

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two-thirds of the gross passage money to be received from cabin passengers, the master finding them in wines, ales, and spirits. The first three items, therefore, of the account, as they appear in the schedule annexed to this report, were not disputed. Items 4, 5, and 6, which were for the master's expenses at Liverpool and throughout the voyage, his board wages at Liverpool, and his petties for two months, were considered reasonable, and were consequently allowed. Item No. 7, his ten days' double pay under the statute, was not objected to; and seeing that the payment of the master's wages had been delayed owing to the difficulties of Mr. Klingender, over which he, the master, had no control, we thought that the payment had been delayed, so far as the master was concerned, 'without reasonable cause,' and we consequently allowed this item. Item No. 8 was also not objected to.

"Item No. 9, for tobacco and slops supplied to seamen, who afterwards deserted, was objected to. It seems that the practice is for masters of ships to supply the crew with such slops and tobacco as they may require from time to time, and at the termination of the voyage the value of the articles supplied to each seaman is deducted from the amount due to him in settling with him for his wages. Hutchinson seems to have followed the usual course, and on the voyage out he had supplied to certain seamen, who deserted at Melbourne, slops and tobacco of the value altogether of 38*l.* 1*s.* 10*d.* This sum he claimed to be repaid. It was, however, objected that the supply of slops and tobacco was a private speculation of the master, that it was a debt due from the seamen to him, and that he must look for repayment to them and not to the ship.

"On the other hand it appeared that these seamen, when they deserted, had forfeited wages to the amount of no less than 104*l.* 11*s.* 3*d.*; the ship had gained this sum by the men's desertion.

"It seems therefore hardly reasonable to us that the master, having made these advances in accordance with the usual practice in the merchant service, on the security of the wages which were being earned by these men, should be left to bear the loss of these advances whilst the owners took the whole benefit of the forfeited wages; it seems to us that these advances were in the nature of a lien upon the wages, and that the owners must take the wages *cum onere*; they could not take the wages and repudiate the lien."

"Items Nos. 18 to 22 were also strongly objected to, chiefly on the ground that they had not been paid, that they were consequently mere liabilities, and would not be included under the term "disbursements" in the Admiralty Court Act, 1861. I am well aware of the decisions of the learned judge in the cases of the *Chieftain* (1) and the *Edwin*. (2) I cannot, however, but think that in this and other cases an attempt has been made to strain those judgments beyond what the learned judge ever intended, my reasons for that opinion were very fully stated by me in a recent case, that of the *Red Rose*, and I will now only refer to them here. The report in that case was confirmed, and I shall therefore adhere to that opinion until I am overruled by higher authority. I shall, therefore, take the same course in this case as I did in that and in several others that have come before us. I shall allow the items, but shall accompany it with a recommendation that no order for the payment thereof be made until the master has deposited in

(1) *Brow. & Lush*, 104.(2) *Brow. & Lush*, 281.



the registry vouchers for the payment, or given satisfactory evidence that the accounts have been paid.

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"The objection then to these items as liabilities being removed, four of them will be admissible, viz., No. 18, which is an account for provisions supplied for the use of the ship's company at Queenstown, into which she put on her way home; No. 20, for provisions obtained at sea on the homeward voyage and not yet paid for, and Nos. 21 and 22, for expenses attending the discharge of the homeward cargo, for which the master, as master, made himself personally liable, and which he was compelled to do to enable him to earn his freight, the stevedore and master porter having refused, owing to Mr. Klingender's failure, to proceed with the discharge, unless Captain Hutchinson made himself personally liable to them for the amount.

"A special objection was, however, taken to the allowance of item No. 19. It seems that the charter entered into by the master at Point De Galle, was for the conveyance of a cargo of cotton, which a ship called the *Euterpe* had been from some cause or other unable to carry on. The charter was between Captain Hutchinson and Captain Storey of the *Euterpe*. The freight to be earned was a large one, and it seems to have been agreed that the commission, amounting to 27*l.* 9*s.* 10*d.*, should be divided equally between Messrs. Wakefield, Nash, and Co., the agents for the *Feronia*, and Messrs. Alexander Reid and Co., the agents for Captain Storey of the *Euterpe*. Accordingly two bills were drawn by the master on Mr. Klingender for 135*l.* 4*s.* 11*d.* each, one of which was given to Messrs. Wakefield, Nash, and Co., and the other to Messrs. Alexander Reid and Co. The former was duly paid, but the latter, which fell due on the 20th of August, 1866, was returned dishonoured by Mr. Klingender. It was stated by the master in his evidence that he had not received any notice of dishonour, and it was thereupon contended by the defendants that the master was no longer liable under the bill. On the other hand, a letter was produced from Messrs. Hull, Stone, and Fletcher, the solicitors for the bank of Hindustan, China, and Japan, Limited, the holders of the bill, addressed to Messrs. Bateson and Co., who were then the solicitors for the master, in which they say: 'We shall be glad to receive payment now, or to have some acknowledgment that the bank's claim is admitted, so that payment can be secured at some future time.' In reply to which Messrs. Bateson and Co. say: 'Mr. Baily is receiving all the freight, and is to hold a sum to cover all the liabilities of the master, and we trust there will be no difficulty in having all claims paid, the one you represent included.' The merchants are of opinion that this letter from the master's solicitor may be taken as tantamount to a waiver of notice of dishonour, and that consequently the master would be liable under the bill, I shall therefore allow this item in the claim.

"The result, then, is that the first nine items of the claim will be allowed absolutely, but that items 18 to 22, both inclusive, will be allowed conditionally on vouchers, showing that payment has been made, being deposited in the registry.

"Lastly, we are of opinion that the master is entitled to his costs." (1)

From this report, the National Bank of Liverpool appealed to the Court, and objected to the entire claim of the plaintiff, upon

(1) Here followed the registrar's an abridgment of which is given as an report in the case of the *Red Rose*, addendum to this report. (from 500)

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Jan. 27. *Brett, Q.C.*, and *Lushington*, for the National Bank of Liverpool.

*Aspinall, Q.C.*, and *Cohen*, for the plaintiff.

The arguments and the authorities referred to are fully stated and commented on in the judgment.

*Cur. adv. vult.*

Feb. 4. SIR ROBERT PHILLIMORE. On the 11th of December, 1866, a cause was instituted in this Court against the vessel *Feronia* and her freight, in the sum of 2500*l.*, by Robert Hutchinson, part owner and late master thereof. On the 18th, the judge, Dr. Lushington, decreed a monition against Messrs. Bailey & Co., average adjusters, to pay into Court the balance of freight of this vessel then remaining in their hands. On the 21st an appearance was entered on behalf of the National Bank of Liverpool, mortgagees by transfer of forty-eight shares in the vessel. Appearances were subsequently entered on behalf of three other parties, Mr. Rickarby, a part owner and mortgagee of the homeward freight,

Messrs. Swire, other mortgagees of the homeward freight, and Mr. Hughes, a part owner. On the 7th of May, 1867, the judge referred the plaintiff's claim to the registrar, assisted by merchants, to report the amount due thereon. On the 12th of August the registrar made his report, to the effect that he found due to the plaintiff "Robert Hutchinson, in respect of his wages and disbursements as master of the ship or vessel *Feronia*, the sum of 1087*l.* 8*s.* 5*d.*, together with interest thereon," and costs. From this report the National Bank of Liverpool alone, of all the defendants, have appealed to the Court. First, they object to the entire claim of the plaintiff as master, upon the ground that he was part owner of the ship, an objection which was not taken in the answer to the original petition before the Court; for, on the contrary, the defendants prayed that the whole claim of the plaintiff might be referred to the registrar. The Court, however, was of opinion, that it could not refrain from entertaining the objection; though it ought to have been taken on the original pleadings, inasmuch as it raised a question of law to be decided by the Court in the first instance, and, if valid, the necessary expense and delay occasioned by a reference to the registrar ought to have been avoided. It has been said that the objection did not arise till the defendants were proved to be mortgagees; but that is a fact which would probably have not been denied by the plaintiff, and if it had been, might have been easily proved before the Court. The Court, however, has allowed the question to be argued at this stage of the proceedings; and, as the objection lies in limine, and if rightly taken renders the discussion of the other objections unnecessary, I had better deal with it in the first instance. The argument of the defendants appears to be, that the plaintiff, who is part owner as well as master, has, by reason of his liabilities in the former character, forfeited the rights which would otherwise accrue to him in the latter. He cannot, it is said, recover in this Court against himself; there is no contract with him as master; the only contract made was one on his behalf with himself; and he is really in this suit claiming as a part owner in an account against other part owners, which it is competent to him to do in this Court under the 8th section of 24 Vict. c. 10, but not under the general law, by reason of a maritime lien upon the ship, which is his present contention. If he

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has not a lien of this peculiar character, unknown to the common law, which attaches to the res, and travels with the res into whatever hands it passes, then it is contended that he has no title to payment for wages or disbursements out of the fund which is now in court. During the voyage of the ship the mortgagees were not owners, but when the ship came into port in this country, and before she was arrested they became mortgagees in possession, and from that period they are to be treated as owners. Now, as such, it is argued they are not liable to any previous contracts made by the former owners, not even for necessities, according to a very recent decision of the Court of Exchequer: *Bright v. Fleming* (1), and another case, *Dickinson v. Kitchen* (2), in which it has been ruled that a mortgagee in possession, whose mortgage has been registered as required by sections 66 and 70 of the Merchant Shipping Act, 1854, has a right even against an execution creditor of the mortgagor. The legislature, it is further said, contemplated two kinds of masters: 1. Those that navigated their own ship. 2. Those that navigated for wages a ship not their own. It might happen that the master was sole owner, and mortgaged his ship; could he then be entitled to his wages, which might eat up the value of his mortgage? This is, I believe, a fair summary of the argument which has been addressed to me for the purpose of proving that a master who is part-owner cannot have a maritime lien, and that no other lien would give him any claim to have his wages paid out of the freight in derogation of the claim of the mortgagee in possession. Before I consider this argument it may be as well to state in the language of the Judicial Committee of the Privy Council, the nature of a maritime lien. Their lordships say in *Harmer v. Bell, The Bold Buccleugh* (3), "A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither pre-suppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothe-

(1) Not reported.

(2) 8 E. & B. 789.

(3) 7 Moo. P. C. at p. 284.



cation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. 1868  
Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Story, J. (1), explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.”

Upon this argument the first observation which arises is that, although there have been a great number of cases in which the master being also part owner has sued for wages upon the ground of his maritime lien upon the ship, this is the first instance in which the present objection has been raised, and the *Gananogue* (2) is cited as a case in which the present objection must and would have been taken if the counsel or the judge had considered it tenable. This observation, however, although not without its weight, does not relieve the Court from the necessity of inquiring into the validity of the objection, now that it is taken. The master of the vessel by the common law and by the practice of this Court did not possess the right which the common seaman enjoyed of suing for his wages in the High Court of Admiralty. The history of the changes effected by recent legislation on this point has been fully considered in various cases determined by my learned predecessor: the *Ocean* (3); the *Wataga* (4); the *Cale-*

(1) 1 Sumner, 78.

(3) 2 Wm. Rob. 368.

(2) Lush. 448.

(4) Swab. 165.

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*donia* (1); the *Edwin* (2); the *Mary Ann*. (3) In the case of the *Mary Ann* (3), it was decided that, under the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), the master has a maritime lien both for his wages and disbursements, and that upon this ground his claim was preferable to that of a mortgagee. Under the last statute this Court has jurisdiction "over any claim by the master for wages earned by him on board the ship, and for disbursements made by him on account of the ship." The latter clause must be the subject of a distinct consideration. First, I must observe that this new right is given by this statute to "the master" generally without limitation or qualification of any kind. No subsequent statute supplies any limitation or qualification. On what principle of law, on what rule governing the construction of statutes, is the Court to import into this general enactment in favour of the master, the limitation "unless he be part owner?" That the legislature contemplated two kinds of masters, and intended to confine the privilege of a maritime lien to one kind, appears to me a baseless suggestion. If I place myself in the position of the legislature at the time when these various statutes were passed, extending the protection enjoyed by the common seaman to the master, and removing gradually the injustice which the common law—perhaps out of an ancient jealousy of the Admiralty Court—had inflicted upon him, I cannot doubt that the legislature well knew that the combination of master and part owner was a fact of frequent and increasing occurrence, and I believe it has been truly argued that, as a matter of public policy, it was desirous of encouraging this combination; nor could it be contended that, under the old law, a common seaman who was also a part owner (and such cases may often have happened) could have been on that account deprived of his maritime lien for wages. As to the argument that a man cannot sue himself upon a contract, the answer is that this is not a case of contract properly speaking, but of lien, and that in the case already cited of the *Gananogue* (4), a master who was part owner did recover his wages against another part owner under the same provision of the statute which the present plaintiff has invoked on his behalf. During the course of

(1) Swab. 17.

(2) Brow. &amp; I

(3) Law Rep. 1 Adm. 8.

(4) Lush. 448.

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the argument on the behalf of the defendants, I put a question, which was not, to my mind, satisfactorily answered, namely:—It being admitted that the mortgagee in possession would be obliged to acknowledge the lien of an ordinary master for his wages—how is he damnified by the fact that the master happens to be also a part owner? This very freight which the mortgagee is now claiming has been earned by the master's navigation of the vessel and her safe conduct into port. It is the produce of his exertion, energy, and skill, and the case of *Bristow v. Whitmore* (1), would warrant me, if any such authority were needed, in saying that the claim of the master upon the freight for his wages is founded upon a natural justice. The mortgagee has already possessed himself of the ship, and he now requires that the whole of the freight, without any deduction for the wages of the master, who earned it, should be paid over to him. It is to be observed that if his argument be good, the master, who is also part owner, would have no maritime lien for his wages, if the ship were not mortgaged, for the mortgagee in possession is in no better condition than the owner whom he represents. I am of opinion that it is not competent to the Court to impair or take away the right which the statute has given to the master, by engrafting upon it the limitation for which the defendant contends, and I pronounce that the registrar has come to a just and right conclusion in allowing the claim of the master for his wages.

The next question of importance relates to the true construction of the words in the statute, "disbursements made by him." It certainly appears to me that the legislature intended to include under these words all proper expenditure made by the master upon the ship, whether the particular articles, the subject of this expenditure, were obtained by immediate or by promised payment; and that in each case two questions would arise: 1. Had the particular articles actually been applied to the use of the ship? 2. Whether these articles were such as the necessities of the ship justified and required? In the *Chieftain* (2) and the *Edwin* (3), Dr. Lushington put a more restricted interpretation upon these words, holding that the money must have been paid in order to entitle the master

(1) 9 H. of L. 391. *See MS 291* (2) *Brow. & Lush.* 104.  
(3) *Brow. & Lush.* 281.

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(1) Brow. &amp; Lush. 104.

(2) Brow. &amp; Lush. 281.

(3) Swab. 415.

(4) Swab at p. 422.



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in a better position than the owner" (p. 422). I am happy to think also, that in allowing this course to be taken in the particular circumstances of this case, I am not without the sanction of my learned predecessor in this chair; though I entirely agree with the remark of the counsel for the defendant, that it is not within the province of the registrar to decide questions of law unless he be in truth compelled to do so by the particular character of the case, and that it was not competent to him to overrule the decisions in the *Chieftain* (1) and the *Edwin* (2) by his report in the case of the *Red Rose*. (3) Nevertheless, inasmuch as the circumstance which distinguished the case of the *Red Rose* from the *Chieftain* (1) and the *Edwin* (2) was brought under the attention of the late learned judge, as well as the decision of the House of Lords in *Bristow v. Whitmore* (4), subsequent to those cases, and, as he confirmed that report, which allowed liabilities incurred by the master for articles expended for the benefit of the ship to be considered as disbursements, and discharged out of the freight which was in the hands of the Court, I think that I am not without his authority for sanctioning the report of the registrar upon this point in the present case, and I am of opinion that the principle of the decision of the House of Lords in the case of *Bristow v. Whitmore* (4) is applicable to the case before me. It is a strong authority for saying that the mortgagee in possession, or the owner, ought not to be allowed to possess himself of this freight until the master has been indemnified for the labour and disbursements by which that freight was produced.

I pass now to the consideration of the particular items which are objected to. The first is the ten days' double pay of 16*l.* 10*s.* I have, in fact, already disposed of this objection by pronouncing for the claim of the plaintiff upon the principal sum. It is a necessary consequence that I should disallow this objection. The next objection is to item 9:—38*l.* 1*s.* 10*d.*, for tobacco and slops supplied to seamen, who afterwards deserted. The objection is, that these articles were furnished by the master on a private speculation of his own, and that the owner is not liable for them; but by invariable usage these articles have been considered as a part of

(1) *Brow. & Lush.* 104.(2) *Brow. & Lush.* 281.(3) *Post*, p. 80.(4) 9 *H. of L.* 391. *of per RS 291*

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the seamen's wages, and the master is as much entitled to be reimbursed for them as if he had advanced a portion of their wages in money. There is no doubt whatever, that in an action brought by seamen for their wages against the owner, he would be entitled to set off these articles as a part payment of their wages. They fall, moreover, within the category of those deductions of which the master is required by s. 171 of 17 & 18 Vict. c. 104 to keep an account, as well as of the wages. Nor do I think that the fact that the master may make some small profit by supplying these articles affects the justice of his claim. It must be remembered that sailors usually come on board in a destitute condition, and are proverbially reckless as to the manner in which they supply their immediate wants, and it is really both for the interest of the owners of the vessel and for the sailors that this disbursement of the master should be upholden, and I shall uphold it. The only remaining objection I think is, in respect to item 19. It is a sum of 135*l.* 4*s.* 11*d.*, which was one of two bills drawn by the master on Mr. Klingender, the principal owner, in order to pay a commission upon a charter for the homeward conveyance of a cargo of cotton, whereby a large freight was to be earned. According to the report of the registrar, the former of these two bills was duly paid, but the latter, which fell due on the 20th of August, 1866, was returned dishonoured by Mr. Klingender. It was stated by the master in his evidence that he had not received any notice of dishonour, and it was thereupon contended by the defendants that the master was no longer liable under the bill. On the other hand a letter was produced from Messrs. Hull, Stone, & Fletcher, the solicitors for the Bank of Hindustan, China, and Japan (Limited), the holders of the bill, addressed to Messrs. Bateson & Co., who were then the solicitors for the master, in which they say, "We shall be glad to receive payment now or to have some acknowledgment that the bank's claim is admitted, so that payment can be secured at some future time." In reply to which Messrs. Bateson & Co. say, "Mr. Bailly is receiving all the freight, and is to hold a sum to cover all the liabilities of the master, and we trust there will be no difficulty in having all claims paid, the one you represent included." The merchants are of opinion that this letter from the master's solicitor may be taken as tanta-

mount to a waiver of notice of dishonour, and that consequently the master would be liable under the bill; I shall therefore allow this item in the claim. The law as to the consequences of neglect to give notice is thus laid down by Mr. Justice Byles, in his work upon Bills of Exchange, 8th ed., p. 272. "The law," he says (I do not think it necessary to state the decisions from which he deduces his statement of the law), "presumes that, if the drawer has not had due notice, he is injured, because otherwise he might have immediately withdrawn his effects from the hands of the drawee. . . . The consequence, therefore, of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid." It may be questionable, I think, whether the master by reason of his having drawn upon a co-owner, may not be considered as acceptor as well as drawer, and whether, on this account, any notice of dishonour was necessary. Moreover, it appears clear that he had no effects at any time in the hands of the acceptor, and Mr. Justice Byles states (p. 274) the law applicable to this state of things as follows:—"If the drawer had no effects at any time during the currency of the bills in the hands of the acceptor, and will have no remedy against the acceptor or any other person if he be obliged to pay the bill, he cannot, in general, have been prejudiced by want of notice, and therefore cannot set that up as a defence." Again, looking to the nice distinctions taken on this subject, I am by no means certain that the merchants were not right in their opinion that the notice of dishonour, if any were necessary in this case, had been waived. But, lastly, it appears to me that a broader ground than any of those which have been alleged may be taken for sustaining the allowance of this sum by the registrar. The whole principle of this notice of dishonour is founded upon the notion of benefiting the drawer, and it appears to me not only that he has not been injured by the absence of notice, but that he has never taken such objection or set it up as a defence; and I do not understand how it is competent to the defendants, who represent the acceptor, to set up against the will of the drawer an objection of this kind, which he refuses to put forward. For these reasons, I shall confirm the report of the registrar; but, inasmuch as questions of law of great importance, as to

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the right solution of which considerable doubt might reasonably exist, have been discussed before me, I shall make no order as to the costs incurred by the objection to this report.

Proctors for plaintiff: *Pritchard & Sons.*

Solicitors for the National Bank of Liverpool: *Chester & Urquhart.*

RED ROSE.

Nos. 2800 &amp; 2848

*Ante 697*  
*8 PD 50, -1*  
*52,*  
This case, which was a cause by the master of the *Red Rose* for his wages and disbursements, was argued before myself and the merchants, on the 16th of July last, by Mr. Clarkson on behalf of the plaintiff, and by Dr. Tristram on behalf of Messrs. Gregson & Co., the alleged assignees of the freight.

The facts of the case are as follow:—On the 4th of March, 1864, Mr. A. Ker Curtis, the owner of the *Red Rose*, a vessel of 1454 tons register, engaged the plaintiff Richard Spratly, to take charge of her as master. The vessel was at the time lying in the port of London under orders to proceed with a general cargo and passengers to Melbourne, and on the 6th of the same month she sailed on her intended voyage under the plaintiff's command, and arrived safely at Melbourne in the month of June following, and discharged her cargo and passengers. Thereupon it having been left entirely to the master's judgment to do the best he could for the ship, he, on the 21st of July following, entered into a charterparty with a Mr. Nicholas Riordan, through his agent at Melbourne, for the vessel to proceed to Calcutta, and there take in a cargo for London at 3*l.* 17*s.* 6*d.* per ton. There was a condition that the charterer should "have the option of cancelling or maintaining the charterparty, should the vessel not have arrived, and be ready to receive cargo on or before the 15th of October." The master accordingly took on board about 200 tons of copper, with which the vessel sailed for Calcutta, where she arrived, and discharged the cargo in the month of September following. On the 5th of October, whilst the vessel was lying at Calcutta, ready to take in her cargo, she was caught in the fearful cyclone, which destroyed the greater part of the shipping in that port, and was very seriously damaged. The vessel was thereupon put into dock and repaired, and on the 1st of March, 1865, she sailed from Calcutta for this country with a cargo of seed, and about 314 European troops, in pursuance of a charter party which the master had entered into with the government. On the 3rd of July following she arrived at Portsmouth, there landed the troops, and on the 5th she reached the port of London, there discharged her cargo, and on the 19th of the same month the master's engagement terminated.

In the meantime Mr. Ker Curtis had become bankrupt, and accordingly on the arrival of the vessel Messrs. T. M. Mackay & Co., as mortgagees, took possession of her. Causes also were instituted against her in this Court on behalf of the crew for their wages, on the bottomry bond given by the master at Calcutta to cover the cost of the repairs, for towage, and on behalf of the present plaintiff for his wages and disbursements. The result was that the vessel was sold by order of the Court, the amount realized by the sale thereof was 9300*l.*, in addition to which a sum of 2300*l.* 12*s.* 9*d.* was paid in by the consignee of the cargo as the net amount of the freight, and 6166*l.* 19*s.* 8*d.* by the India Office as the net



amount of passage money for the troops. Out of these amounts were paid the seamen's claims, the bottomry bond, the towage, and the costs, leaving a sum of 5134*l.* 5*s.* 4*d.* in court, which is now the subject of dispute between the parties.

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[The registrar then detailed the history of certain bills accepted by Messrs. Gregson & Co. on the security of a charterparty entered into by the owner of the vessel with Messrs. Sichel & Co., of Manchester, on the 15th of August, 1864, by virtue of which Messrs. Gregson claimed to have had an assignment made to them of the freight of the *Red Rose*.]

Two days after the owner had executed the charterparty of the 15th of August, 1864, and had obtained an advance of 4000*l.* thereon, he writes to the master, in a letter dated the 17th of the same month, informing him thereof, and at the same time saying, "You will bear in mind this charter is a merely nominal one, and you will lay on your ship for London only with Messrs. Grant, Smith, & Co., and do the best you can for her, it will not prevent your obtaining the best rates, but only oblige you to go by G. S. & Co." Nine days after this, on the 26th of August, 1864, the owner writes a further letter to the master informing him that he had suspended payment, and stating that he had made arrangements "with Messrs. T. M. Mackay & Co., of this city (the mortgagees of the ship), and Messrs. Grant, Smith, & Co., of Calcutta, for continuing the voyage of the vessel to England."

Messrs. Grant, Smith, & Co., of Calcutta, the firm to which the master was directed by the owner in the above two letters to address himself, were also the agents of Mr. Riordan, and are expressly mentioned in the charterparty entered into at Melbourne as the agents to whom the vessel was to be addressed at Calcutta. Accordingly, the master had already, and before the receipt of either of the owner's letters, placed himself in communication with Messrs. Grant, Smith, & Co., and had, on the 14th of September, 1864, written to them a letter, in which he informed them that the *Red Rose* was ready to take in any cargo they might think proper to send, and that her lay days would commence from that day inclusive. Five days afterwards, on the 19th of the same month, the master receives the owner's letter of the 17th of August preceding, informing him of the second charterparty, and, accordingly, on the same day, he writes a letter to Messrs. Grant, Smith, & Co. in the following terms:—

"Calcutta, Sept. 19th, 1864.

"DEAR SIRS,—In reference to the conversation held with Mr. McIver this morning, relative to a second charterparty forwarded to me from London by this day's mail, I beg to advise you that I shall adhere to the charter forwarded to you from Melbourne by the agents of Nicholas Riordan, Esq., and acknowledged by you, and again refer you to my letter of notice, dated the 14th instant."

And in a letter of the 20th of the same month to the owner of the *Red Rose*, in reply to his of the 17th of August preceding, he tells him that he cannot think of acting upon the charterparty which he had sent him, and that he must get out of the dilemma as best he can, points out to him that there would be a loss of over 3000*l.* to the ship by his accepting his charter, which was at only 2*l.* 5*s.* a ton, in preference to that into which he had entered with Mr. Riordan at Melbourne, which was at 3*l.* 17*s.* 6*d.* a ton; calls attention to the words "nominal charter," occurring in his letter, and says, "whosoever caused you to make such a charter as the one you signed has deceived you and led you astray."

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On this statement of facts, which is not disputed, Messrs. Gregson & Co., in the first place, contend that the return voyage to this country was effected under the charterparty of the 15th of August, 1864, and that, as assignees of the freight under that charter, they are entitled to the proceeds in court. In support of their contention Messrs. Gregson & Co. have produced no evidence, they might have brought in an affidavit from Messrs. Grant, Smith, & Co., of Calcutta, to show under what charter the vessel was laden, but they have done nothing of the kind; all that they have done is to bring in an affidavit from Mr. Gregson, who can of his own knowledge know nothing of the matter. On the other hand, the master distinctly stated in his evidence before us, that the second charter, under which Messrs. Gregson & Co. claim as assignees, was never carried out; indeed his letters, both to Messrs. Grant, Smith, & Co. and to his owner, clearly show that he refused from the first to recognize, and for very good reasons, this second charterparty.

On his examination before us, the master admitted that he had drawn three bills at Calcutta upon Messrs. T. M. Mackay & Co., for 1500*l.*, 1800*l.*, and 1055*l.* 11*s.* 2*d.*, and had given them to Messrs. Grant, Smith, & Co. in return for the advances, which they had made to him, to enable him to disburse the ship there. He stated that these bills having been refused payment, he had of course not given credit for them in his account, for that he was liable for the amount, and indeed had since his return to this country been served with a notice, holding him responsible for their payment.

It was contended by Dr. Tristram that the master's claim must be diminished by the amount of these three bills, for that not having been paid, they must be regarded not as disbursements but as liabilities, and that on the authority of the *Chieftain* (1) and of the *Edwin* (2), they must therefore be disallowed. In reply it was contended by Mr. Clarkson that Grant, Smith, & Co. were the agents of the master and not of the owner; that the charter, under which the ship took in her return cargo, was originally made by the master with Riordan, and was carried out between the master and Messrs. Grant, Smith, & Co., as Riordan's agent, and that they knew nothing of the owner in the transaction; that they had accepted the master's bills in satisfaction of their claim for the disbursements, and that it was tantamount to a payment in cash, the master being responsible to them for the amount. Mr. Clarkson further contended that, even admitting the amount to be only a liability, yet if that liability was incurred in expenses necessary to enable the ship to earn her freight, the master was entitled to be reimbursed the amount out of the freight earned, on the authority of the judgment of the House of Lords in *Bristow v. Whitmore*. (3)

It appears from the master's accounts that the cost of the repairs at Calcutta, or, as they are called, the expenses on account of average, amounted to 981*l.* 8*s.* 9*d.*, but these were more than covered by a sum of 10,321*l.* 15*s.* 4*d.*, which was raised by the master on bottomry of the ship and freight expressly to meet this charge. The other charges at Calcutta, including an expense of 700*l.* 5*s.* 5*d.* for fitting out and provisioning the ship for the reception and conveyance of the troops, were met by the master, partly by moneys which he had in hand, by freights which

(1) Brow. &amp; Lush. 104.

(2) Brow. &amp; Lush. 281.

(3) 9 H. of L. 391.

he had received at Melbourne and Calcutta, and by one third of the troop passage money advanced to him at Calcutta, amounting to no less a sum than 280*l.* 7*s.* 3*d.*, and partly by the moneys advanced to him by Messrs. Grant, Smith, & Co., in return for the three bills, amounting together to 435*l.* 11*s.* 2*d.*, which he had given to them. On the other hand the freights earned on the return voyage were as follows :—

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|                                                              |              |
|--------------------------------------------------------------|--------------|
| Net freight on the cargo paid into Court . . . . .           | £2300 12 9   |
| Troop passage money paid to the master at Calcutta . . . . . | 2802 7 3     |
| Do. do. paid into Court . . . . .                            | 6166 19 8    |
| Total . . . . .                                              | £11,269 19 8 |

It is not indeed denied that the disbursements, which appear in the master's accounts, were in fact made by him at Calcutta, and that they were properly and necessarily incurred. Looking also at the fact that the cost of fitting-out and provisioning the ship to receive the troops amounted to no less a sum than 7004*l.* 5*s.* 5*d.*, it may be reasonably assumed that the bills for 435*l.* 11*s.* 2*d.*, were given for the express purpose of covering these charges, and of enabling the vessel to earn the very large amount of passage money which she did earn, viz., 9000*l.* But it is stated that, whether this be so or not, the bills not having been paid, the disbursements which have been made, so far as they are covered by the amount of these bills, are no longer disbursements, but that they are mere liabilities. The words of the act are that the High Court of Admiralty shall have jurisdiction "over any claim by the master of any ship for wages earned by him on board the ship, or for disbursements made by him on account of the ship." But if the defendant's contention were well founded, the question in every case would be not whether the disbursements had been really made by him or not, but in what manner the master had obtained the money with which he had made them. He would have to shew not merely that he had made these disbursements, but that he had repaid all the money which he may have had occasion to borrow in order to pay them. Indeed, it would go to shew that, if a master had borrowed money from a friend on his own personal credit, and had applied that money to the ship's disbursements, those disbursements would be not disbursements, but mere liabilities, unless the master had repaid to his friend all the money which he had borrowed from him. And how does such a case differ from the present? Messrs. Grant, Smith, & Co. advanced the money to the master, not certainly on the security of the owner, for he was then bankrupt, but no doubt on the faith that the bills would be paid out of the very large amount of freight which the master was about to earn by the conveyance of troops to this country. Consider for one moment the hardship to which masters would [be exposed if, after they had expended large sums for the purpose of earning a good freight, and had drawn bills upon their owners for the amounts, the owner, or the person standing in his position, could claim the whole amount of the freight, leaving the master to pay the expenses by which that freight had been earned.

Prima facie, therefore, I should be inclined to think, looking at the words of the Act of Parliament, that, notwithstanding the non-payment of the bills, the court would have jurisdiction to entertain the master's claim for these disbursements, and that the master would be entitled to be paid the amount thereof, subject to the limitation which I shall presently state; and I should so hold,

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unless indeed it had been laid down in very clear and unmistakable language by the Court, that the master was not so entitled. I am told, however, that it has been so ruled by the Court in the cases of the *Chieftain* (1) and the *Edwin*. (2) Let us see, then, what those cases are, and whether they bear out the proposition which is here contended for.

The case of the *Chieftain* (1) was a suit for master's wages and disbursements. From the report of the case it appears that the master had been originally appointed to the command on the 26th of May, 1862. At that time the ship was in the Thames Graving Dock, undergoing repairs. There she remained until the 25th of November following, when she was removed to the Victoria Docks. After a time the ship began to take in cargo, but on the 16th of January, 1863, the owner having in the meantime become bankrupt, the mortgagees took possession of her, and on the 14th of February following the master was discharged. Thereupon he instituted a suit for the recovery of his wages and disbursements, and he claimed for necessaries alleged to have been supplied to the ship on his order, during the time that he had been master of her, a sum of above 1300*l*. Now, in what respect does this case resemble that of the *Red Rose*? In the case of the *Red Rose*, a large freight has been earned by the expenditure of the sums for which these three bills were given; that freight is in the hands of the court, and all that the master asks is that he may be repaid out of the freight the disbursements by which that freight has been earned. On the other hand, in the case of the *Chieftain* (1), the vessel had never left port during the whole period of the master's service, the master it seems had only slept on board on one or two occasions during the whole time, no freight whatever had been earned, and it could not be said that the disbursements which the master claimed had resulted in realizing for the ship any fund out of which those disbursements might have been paid. The master's claim was not against the freight, but against the proceeds of the ship itself. The whole transaction had taken place in this country with the cognizance, and no doubt under the directions of the owner, and the Court may very well have thought that it was merely an attempt to shift the burden of these charges from the shoulders of the owners to those of the mortgagee, and refused to allow them. I cannot admit this case as an authority for my guidance in the case of the *Red Rose*.

The case of the *Edwin* (2) was very exceptional. There the person, by whom the master had been appointed, had fraudulently possessed himself of the vessel, and had sent her in charge of the master to Quebec, for a cargo of timber. On her return the rightful owner repossessed himself of the vessel, and discharged the master, who thereupon brought his action for wages and disbursements. The master claimed, in addition to his wages, a sum of about 480*l*. for alleged disbursements on account of the ship, for which he had given a bill upon the fraudulent person, by whom he had been appointed, and which bill had of course been dishonoured. Whether any freight had been earned or not, whether these disbursements at Quebec, amounting to 480*l*., had resulted in earning for the ship a fund, out of which the disbursements might have been paid, does not appear; at all events, the application was not for the disbursements to be paid out of any such fund, but out of the proceeds of the ship itself, for it appears from the report

(1) Brow. &amp; Lush. 104.

(2) Brow. &amp; Lush. 281.



that the proceedings were against the ship alone, and not against the ship and freight. The case was a very hard one upon the rightful owner, it was full of suspicion; the master had at first resisted, and resisted successfully, the attempt of the rightful owner to regain possession of the vessel, and although it was not shewn that the master had been cognizant of the fund, so as to disentitle him to his wages, it may well be that the Court considered that the master was not entitled to any very special indulgence. At all events, it is a very different case from that of the *Red Rose*, and I could hardly regard it as an authority for my guidance in that case.

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I think, however, that I am justified in concluding that the Court never could have intended to carry the principle to the extent which is here contended for, when I find a case, which appears to me to be so directly in point with the present one, and which must have been present to the mind of the learned judge, when he decided the cases of the *Chieftain* (1) and the *Edwin*. (2) The case to which I refer is that of *Bristow v. Whitmore*. (3) It passed successively through three courts, and is, I believe, a case of very high authority.

It was the case of a vessel coming from the East Indies, which took on board at the Mauritius and at the Cape of Good Hope troops for conveyance to this country. With a view to enable the ship to earn the passage-money, the master was compelled to expend large sums for provisions, &c., at both those places, and for the greater part of those expenses he gave bills upon his owners. Before, however, the arrival of the ship in this country, the owner failed, and the bills having been refused, the master received notice that he would be held liable for the payment thereof. He thereupon applied to the Court of Chancery for a declaration that he was entitled to be repaid out of the passage-money the sums which he had expended for fitting-out and provisioning the vessel, to enable her to convey the troops, and also to be indemnified thereout against payment of the bills which he had drawn upon the owners. Vice-Chancellor Wood held that he was so entitled; this judgment was reversed by Lord Chancellor Chelmsford on appeal, but ultimately the House of Lords affirmed the judgment of the Vice-Chancellor, reversing the decision of Lord Chelmsford. The case, therefore, it will be seen, was very fully considered, and there are some observations which fell from the learned judges in the House of Lords, which appear to me to have an important bearing on the present case.

Thus Lord Campbell, then Lord Chancellor, says (4): "The plaintiff's claim is most reasonable, and natural justice requires that it should be conceded." And he goes on to say: "He is an agent, who, acting with perfect good faith for the benefit of his principal, has, in the performance of a contract, which his principal has ratified and adopted, laid out sums of money, and made himself personally liable for other sums of money, and who seeks to be repaid and indemnified out of a fund which is produced by the contract, and which, according to the terms of the contract, was to come into his hands." And further on he says (5): "The money being received by the master, he would have had a legal lien upon it in his hands: I think he had an equitable lien upon it (that is to say,

(1) *Brow. & Lush.* 104.(2) *Brow. & Lush.* 281.

(3) 9 H. of L. 391.

(4) 9 H. of L. at p. 400.

(5) 9 H. of L. at p. 402.

*See also 29/1*  
*See also 293*

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he had a specific right to be paid out of it) while it was in the hands of the Lords of the Admiralty as stakeholders, and now, when it has been paid by them into Court." Lord Cranworth also says (1): "The principle which must I think govern this case is one of universal application; namely, that, where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. The contract must be performed in its integrity. Here the appellant, as agent for the owner now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear, and certain labours which he undertook to perform. If he had authority to enter into such a contract, the principal is of course bound. If he had not authority, then the principal may repudiate the contract; but he cannot take that part of it which is beneficial to him without performing that part which is onerous." Lord Kingsdown also, in giving his reasons, says (2): "If an agent make a contract on behalf of his principal, whether with or without authority, the principal cannot at once approbate and reprobate it. He must adopt it altogether or not at all. He cannot at the same time take the benefits which it confers and repudiate the obligations which it imposes." And then, after stating the facts, his lordship observes: "The owner, or, which is the same thing, the mortgagee, adopts the contract, and what he now insists upon is in effect a right to receive the money earned, leaving the agent to pay the expenses by which the earnings were acquired."

I should add that Lord Chelmsford and Lord Wensleydale differed in opinion from their colleagues, but judgment was given for the claim of the master, "as against all persons interested in the freight," to be indemnified out of the freight in the full amount of his disbursements, including the liabilities incurred under the bills, which he had drawn upon the owners.

Almost everything that I have quoted from the case of *Bristow v. Whitmore* appears to me to be directly applicable to the case of the *Red Rose*. In this case the master incurs heavy expenses to enable him to earn a large freight, and to cover those expenses he draws bills upon the owner, or rather upon the mortgagee, who stands in the position of the owner; the freight earned is more than amply sufficient to cover these bills or liabilities; the mortgagee cannot at the same time approbate and reprobate the contract, he must adopt it altogether or not at all; by the terms of the charterparty entered into for the conveyance of these troops, the master was entitled to claim the payment of the freight, he therefore had a specific right to be paid the amount of these bills out of the money, whilst it was in the hands of the government as stakeholders, and now when it has been paid by them into Court. On the whole I can see no distinction whatever between the present case and that of *Bristow v. Whitmore*. And as that is the decision of one of the two ultimate Courts of Appeal, arrived at after the most mature deliberation, I apprehend that the Court of Admiralty would consider it to be binding upon itself.

I shall hold therefore that notwithstanding that those three bills of exchange have not been paid, the master is entitled to the full amount of the disbursements made by him, as appears from the accounts; inasmuch, however, as the settlement

(1) 9 H. of L. at p. 404. *o/p m & 1294* (2) 9 H. of L. at p. 418. *o/p m & 1297*

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of the amount is effected on the assumption that the master is liable for and will pay the amount of these bills, care must be taken that after his claim has been paid in full, these bills, or rather the necessities which they represent, are not left as a charge upon the ship. The order therefore which I make in this case is, that the bills must be paid and deposited in the registry before the master can be entitled to take out the amount of his claim. This is the course which I have adopted in former cases, and it does not appear to me to be attended with any inconvenience.

One further objection was raised, which must be referred to. It is said that, even if the master were now to pay the bills, the amount thereof could not be allowed in his accounts, for that it would be a payment after institution of suit. This is one of those legal quibbles which the Court of Admiralty so much abhors. If I were to admit such a pretension, it would amount to this, that in a reference in a collision cause I could hardly ever admit any one of the items of the claim, for not only is the cause instituted long before the bills for the repairs are paid, but generally before even the repairs themselves are commenced. If it were necessary to wait until all the repairs were completed, and all the bills paid, before the suit could be instituted, not only would the vessel which did the damage have disappeared, but probably all the witnesses also. If on a reference in a collision cause it appears that any of the bills have not been paid, the practice is to require the production of the vouchers, before the amount of the claim is paid. So in the present case I shall require the production of these three bills of exchange, and proof that they have been paid, before the amount of the master's claim can be paid to him out of the moneys in the registry.

I will add that if the master's claim is to be reduced, as Messrs. Gregson & Co. contend, by the amount of these three bills of exchange, the only result would be that the master would then pay the bills, and enter a fresh cause against the proceeds in the registry for the amount; and in that case his claim could no longer be opposed. Such a course would only be attended with additional expense to the parties in the cause, and would have no other result.

In conclusion, I will only observe, that Messrs. Gregson & Co. ought, in my opinion, to be condemned in all the costs incurred by the master in this reference.

H. C. ROTHERY, Registrar.

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*Necessaries supplied to Ship by Master's Order—Liability of Owners—Charterer.*

170/129 The liability of the owner of a vessel to pay for repairs and equipments ordered by the master depends, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessaries.

The master's contracts cannot bind the owner, unless authority to bind the owner has been actually given to him; or unless the owner has, by word or deed, held out the master as his master, and thereby induced the vendor to supply the necessaries upon the credit of the owner.

The owners of a vessel entered into an agreement and charterparty, by which it was provided (*inter alia*) that the master, officers and crew, should be appointed by the owners, be under their control, and be dismissed by them, but that their wages should be paid by the charterer: it was also provided that the master should act as supervisor of the repairs and fittings of the ship. An action having been brought for necessaries supplied to the ship while under this charter, by the master's order, who stated in his evidence that he considered himself as acting for and as the servant of both owners and charterer:—

*Held*, that the owners had held out the master as their master, and that they were therefore liable for the debt.

NECESSARIES. This was a suit brought by Messrs. Morten & Clint, of Liverpool, against the steamship *Great Eastern* and her owners. The petition alleged that in and during the months of January, February, and March, 1867, the plaintiffs executed and supplied upon and to the *Great Eastern* certain repairs and equipments of which she stood in need; and that there was still due and owing to them in respect of the said repairs and equipments the sum of 253*l.* 18*s.* 11*d.* The defendants in their answer alleged that before and at the time of the execution and supply of the repairs and equipments mentioned, the *Great Eastern* was let to one Jules Despecher, under and in pursuance of certain articles of agreement and charterparty, and that the said repairs and equipments were executed and supplied by the plaintiffs, for and on account of the said Jules Despecher, or certain persons whom he represented. And the said repairs and equipments were not executed or supplied for or on account of the owners of the vessel, nor on their credit.

The material portions of the agreement and charterparty relied upon were as follow:—



“Articles of agreement made the 10th November, 1866, between the Great Eastern Steamship Company, Limited, the Telegraph Construction and Maintenance Company, and Jules Despecher.

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“Clause 5. So long as the ship continues in the possession of the said Jules Despecher, Sir James Anderson shall be employed as captain, and George Beckwith as engineer of the said ship, at their present wages, if they respectively consent thereto; and subject thereto, captain, officers and crew shall be appointed by the owners, subject to the approval of a charterer, and shall be under the control of the owners, but their wages shall be paid by the charterer, who shall victual the ship and pay all disbursements usually paid by an owner under a charterparty; &c.

“Clause 7. The owners will procure Sir James Anderson, or if he shall die, decline, or become incapable of acting, then some other person to be mutually agreed upon; or, in case of difference, to be appointed under the provision for arbitration hereinafter contained, to act as supervisor of the repairs and fittings of the said ship,” &c.

“Charterparty made 15th December, 1866, between the Great Eastern Steamship Company, Limited, and Jules Despecher.

“Art. 3. Sir James Anderson shall be employed as captain, and George Beckwith as engineer of the said ship, at their present wages, if they respectively consent thereto; and subject thereto, the captain, officers, and crew shall be *appointed by the owners*, subject to the approval of the charterer, and shall be *under the control of the owners*, but their wages shall be paid by the charterer, who shall victual the ship and pay all disbursements usually paid by an owner under a charterparty, and so long as this charter is in force the captain, officers, and crew shall obey and follow all reasonable and necessary orders and directions of the charterer, his engineers, or agents, in or about the use, employment, and navigation of the ship, and otherwise in relation to the ship, provided the orders and directions so to be given are such as can, in the judgment of the captain, be obeyed and followed consistently with the safety of the ship, and without invalidating the policy or policies of insurance to be effected as hereinafter provided. The owners will, on the request of the charterer, his engineers, or agents, dismiss from the ship any person or persons employed thereon, who shall be

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objected to by the charterer for reasons assigned, and employ suitable persons in place of any so dismissed."

Feb. 12. *Sir Baliol Brett, Q.C. (S.G.), and Clarkson*, for the plaintiffs.

*Mellish, Q.C., and Butt* for the defendants.

The facts of the case, the authorities referred to, and the evidence given, are fully stated in the judgment.

Feb. 18. *SIR ROBERT PHILLIMORE.* This is a cause instituted by Messrs. Morten & Clint, ship chandlers, of Liverpool, against the steamship *Great Eastern*, and the Great Eastern Steam Ship Company, Limited, the owners of the said ship, in respect of certain repairs and equipments for which the sum of 253*l.* 18*s.* 11*d.* is claimed.

The defendants contend that at the time when these repairs were done and equipments furnished, the *Great Eastern* was let to a French gentleman named Jules Despecher, and that these repairs and equipments were not executed or supplied for or on account of the owners of the said vessel, nor on their credit; and certain articles of agreement between the Great Eastern Steam Ship Company, the Telegraph Construction and Maintenance Company, and Jules Despecher, dated the 10th of November, 1866, and a charterparty between the Great Eastern Steam Ship Company and Jules Despecher, dated the 15th of December, 1866, are relied upon in conjunction with certain oral evidence taken before the Court as sustaining this proposition. The cases which must mainly govern the decision of this Court in the particular case now before it, are *Frost v. Oliver* (1), and more especially the case of *Mitcheson v. Oliver* (2), decided in the Exchequer Chamber in 1855. The principles to be extracted from these decisions are, first, that the liability of the owner to pay for repairs and equipments ordered by the master, depends, according to common law, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the agent of the owner for the purpose of ordering these necessities; secondly, that no contract of a master can bind the owner of a vessel unless such authority has been actually given to him; or, thirdly, unless the

(1) 2 E. & B. 301. *1854*

(2) 5 E. & B. 419. *1855*

owner has by word or deed, or by both, held out, as the expression is, the master as his master, and thereby induced the vendor to supply the necessaries upon the credit of the owner. I have now to apply these principles to the facts of the case before me. The circumstances of it are very peculiar :—

Some time—it is said two years—before the agreement of the 10th of November, 1866, the *Great Eastern* steamship had been employed to lay down the cables of the famous submarine telegraph between this country and America. The bargain was out of the ordinary course of such transactions. The *Great Eastern* was specially fitted out for the purpose of laying these cables, and the Telegraph Company covenanted to restore the ship in the condition in which they had received it, to the owners, the Great Eastern Company. Subsequently, with the consent of the owners, a Mons. Jules Despecher undertook to relieve the Telegraph Company of this burden, and to discharge it himself; and the owners (that is, the Great Eastern Company) undertook, with the consent of the Telegraph Company, to charter the steamship to Jules Despecher, from the 1st of January to the 31st of December, 1867, upon certain terms and conditions specified in the agreement, and afterwards, in a separate charterparty between the owners (the Steamship Company) and Jules Despecher; and it is contended by the defendants that, by virtue of the terms and conditions in these instruments, the legal ownership of the steamship had passed over to Jules Despecher for the period above specified, and that the master (Sir James Anderson), who during that period ordered the repairs and equipments in question, was the agent of Despecher, and not the agent of the Great Eastern Company. And special reference was made to a part of the 5th clause of the agreement, by which it was provided “that the wages of the captain, officers, and crew shall be paid by the charterer, who shall victual the ship, and pay all disbursements usually paid by an owner under a charterparty;” and to a passage in the 7th article of the agreement, “the owners will procure Sir James Anderson, or if he shall die, decline, or become incapable of acting, then some other person, to be mutually agreed upon; or, in case of difference, to be appointed under the provision for arbitration hereinafter contained, to act as *supervisor* of the repairs and

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fittings of the said ship." It is obvious, it is contended from these passages, that Jules Despecher was to order and pay for everything, and that Sir James Anderson was to be as supervisor only on behalf of the owners: therefore he had no authority as their master to bind the Great Eastern Company, and, according to the cases above referred to, they are not liable for the articles which were supplied by Sir James Anderson's order to the ship.

But if it were necessary, by reference to the agreement and charterparty, to determine this point—namely, whether he was the agent, as their master, of the Great Eastern Steamship Company, I should be, as at present advised, of a different opinion.

In the agreement, as well as the charterparty, the Great Eastern Company stipulate that Sir James Anderson should be *appointed* by them, be under their *control*, and be *dismissed* by them. [His Lordship then read the 3rd article of the charterparty above set out.]

Surely the power of appointing, controlling, and dismissing are the principal criteria for determining whose servant or agent the master may be. It is said, indeed, that the possession of the vessel was handed over; and the term "possession" is used in the instrument; but in construing these instruments the interests of the shipper or vendor, as well as of the owner and the charterer, are to be borne in mind, and are not to be defeated by the mere use of a technical term. In *Dean v. Hogg* (1), Chief Justice Tindal said: "It must be admitted that in the case of *Hutton v. Bragg* (2), cited by the defendant's counsel, the Court of Common Pleas held that by the charter of an entire ship the possession was parted with to the charterer, so that the owner could have no lien for the freight upon goods put on board; but subsequent cases have narrowed the generality of this doctrine, and have decided that the question, whether the possession of the ship has or has not been given up to and taken by the charterers, must depend upon the terms of the instrument taken altogether, or upon the purpose and object of it." And I agree with the observation of the Solicitor-General that, in fact, no such possession had been transferred, and that the agreement and the charterparty, when examined, import little more than that during a certain time Mons. Jules Despecher should have the power of ordering where the vessel should go to,

(1) 10 Bing. at p. 350.

(2) 2 Marsh. 339.



and of receiving the profits accruing from the conveyance of passengers and merchandize between France, England, and America for a limited time. The hand of the owners, so to speak, was never taken off the steamship. They retained authority over the master and the crew. They had, to a certain extent, the direction of the persons who navigated the vessel, and this is a circumstance which appears to me, on the whole, to have been recognized by the courts as the most important criterion, whether or not the "locatio navis" has been such as to transfer the possession to the charterers; though it appears to me, that the observation of Mr. Maclachlan (Law of Merchant Shipping, p. 308), as to the vacillation and conflict of decisions in the courts upon this subject, is well founded. There is an interlocutory observation made by Mr. Baron Parke in *Mitcheson v. Oliver* (1) which appears to me relevant to this point. Mr. Baron Parke interrupts the counsel to say: "Your argument seems to me to be founded on confusing two different things. One way of making Oliver liable would be by evidence raising a *primâ facie* inference that Thomson really had authority to bind Oliver. I think there was some such evidence; but such *primâ facie* evidence might be rebutted by proof that he had not in truth such authority; and in this case, if the evidence for the defendant is believed, it was rebutted. The other way of fixing Oliver is by shewing such conduct on the part of Oliver as to induce the plaintiffs to believe that Thomson had authority, and such acting by the plaintiffs on that belief as to preclude Oliver from relying on the want of actual authority. What case of that sort is made out here? Do you carry your proposition so far as to say that if the legal owner of a ship demised her for a term of years to a lessee, who was to appoint his own captain and crew, and keep the vessel in repairs himself, the owner would be liable on all contracts for repairs made by the lessee's captain with parties who had not express notice of the demise?" And there this very learned and able judge seems to lay great stress upon the fact that the charterer was to have the appointment of the captain and the crew, as a criterion by which it would be determined whether possession had or had not passed to him.

Assuming, however, that possession of this ship was given to

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Jules Despecher, and that Sir J. Anderson must be considered as his servant so far as the construction of these instruments is concerned, there remains to be considered the important question whether the Great Eastern Company have not held out Sir James Anderson to third parties as their agent for the ship, and have not thereby rendered themselves liable for his contracts; and I must now turn my attention to the oral evidence which was taken before me.

Mr. Morten, the partner of Mr. Clint, ship-chandlers, sold a quickly-drying paint called Docksy paint, and while the *Great Eastern* was on a gridiron at Liverpool he tried this paint upon the bottom of the ship in the presence of Sir James Anderson, who expressed himself perfectly satisfied with it, and gave Morten a verbal order "to go on with the job at once;" to paint 500 feet in length, and 40 feet from each side of the steamship. This order was given on the 26th of January, 1867. The work was done, and while it was being done Sir J. Anderson came to see it from time to time. It cost 188*l.* 11*s.* 2*d.* A bill was made out for that sum, and for an additional sum presently to be mentioned, making a total of 253*l.* 18*s.* 11*d.*, which bill was made out on the 7th of March, 1867, as follows: "To the Owners of Steamship *Great Eastern*," and signed "James Anderson." The additional sum is accounted for in this way:—Sir James Anderson ordered of Clint, the partner of Morten, sixty gallons of paint, and other articles, which were to be used as stores on the voyage. At first these two charges were made out in one bill, and then an arrangement was made that they should be made out in two bills. It appeared in the evidence, however, that these stores were supplied in consequence of a written order from Mr. Yates, who signed himself as agent for Jules Despecher, and it was admitted by the counsel for the plaintiff that the liability of the owners for these stores could not be maintained, and my judgment must therefore be confined to the first sum of 188*l.* 11*s.* 3*d.*

Sir James Anderson deposed that, according to the ordinary course of business, goods were furnished to the steamship upon an order in writing from the agent, a Mr. Yates, at the request of the captain. That he received instructions from the French charterer to carry on the business.

He did not recollect all the circumstances of the order to

Morten, but he admitted that he gave an order to him or his foreman, "to send a man at once who could do it (paint the ship that is) well, and see it done as well as possible," and that he subsequently ordered two bills to be made out. In cross-examination he said he was appointed master in 1864 by the Telegraph Company; that he acted as master in 1865-6, and that after this period, when the steamship was at Sheerness, he gave orders for goods, and hired seamen. He said—as I understood him; but his evidence was given with reluctance, pauses, and hesitation—that there was an interval in September and November, 1866, after the steamship had returned from laying the second cable, when he was not master, though it would appear that at this time nobody but himself gave the usual master's orders to the ship. On the 10th of November, 1866, he was appointed captain again. Despecher, he says, appointed him, through Mr. Yates, as I understood him; and then he made a remarkable answer to the question whether he did not consider himself as acting for the owners. "I acted for both; I did the best I could; I was captain for the charterers and the owners nearly the whole period." Again, "I considered myself as servant of both in some respects. I gave orders, and made arrangements for seamen; the usual orders of a master of a ship in the usual way. Upon the orders I gave the bills were sent in to Mr. Yates;" the bills were afterwards forwarded to him, and he "countersigned them in the usual way; they were afterwards paid by Yates." He said, "I considered Mr. Yates to be the owners' agent; there was written over his door, 'Great Eastern Ship Company'; it has been there ever since I knew the office." He said that he had not been paid as master by the owners; that he looked for payment to the charterer; that on the 1st of May, 1867, he ceased to be captain of the ship, since which period he has been an officer on the staff of the Telegraph Company.

A Captain Paton was examined: He had used Docksy's paint on the West India and Pacific Company's ships. He had formerly commanded the *Great Eastern*.

In January he called on Mr. Yates, and recommended this paint. Mr. Yates told him that these matters were left to Sir J. Anderson, and "reminded me" (said the witness) "that when I commanded the ship he did not interfere." He saw Sir J. Ander-

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son and recommended the paint; he was present when a trial of the paint on the ship was made. Nothing was said about the charterers; and upon this point the evidence generally establishes the fact that no mention was made by Sir J. Anderson or Mr. Yates of the charterers, before the bill had been made out for the paint which had been used upon the ship.

It becomes important to consider the capacity in which Mr. Yates acted. He has been examined. It appears that he was, and is, the secretary to the owners; that after the 10th of November, 1866, he had a power of attorney from Despecher. This has been put in evidence.

That he had an office in Liverpool, the arrangement of which was remarkable: it was as follows:—On the first floor he transacted business for the owners, and there was a brass plate over his door, “Great Eastern Ship Company, Limited.” Higher up, on another floor, he acted as agent for Despecher, and over this door was an inscription, “Steamship Great Eastern.” He says that the usual course of business was, that the captain handed to him a requisition for stores, and that he filled up the order. But he distinctly admits that when Captain Paton called upon him, and when Morten and Clint called upon him, before any order, he referred them to Captain Anderson.

Looking to all the circumstances, I am of opinion that the owners had not transferred the possession of this vessel to the charterer so as to get rid of their liability for the necessities ordered by the master, and I am also of opinion that they did hold out Sir James Anderson as their master to Morten for the paint which he supplied and caused to be applied to the ship while she was on the gridiron; and that sum I pronounce to be due to the plaintiffs. Taking this view as applicable to the case, it is not necessary that I should pronounce a decision either as to the point reserved in *Mitcheson v. Oliver* (1), namely, whether the master had authority in the home port to pledge the credit of his owners for this article, or whether the plaintiffs have a maritime lien upon the ship.

Proctor for plaintiffs: *Ayrton*.

Attorneys for defendants: *Marshall, Westall, & Roberts*.

(1) 5 E. & B. 419. *per 45900*



## THE MINNA.

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March 5.

*Collision—Suit by Bailees of Barge—Compulsory Pilotage—17 & 18 Vict. c. 104, s. 388—Liability of Owners—Practice.*

The owners of a wrong-doing vessel having, by compulsion of law, a pilot on board, held not to be exempt, under the 388th section of the Merchant Shipping Act, 1854, from liability for damage where a neglect of duty on the part of the master conduced to the collision.

The *Iona* (Law Rep. 1 P. C. 426) applied.

In a cause of collision instituted by the bailees of a barge against a steamship:—

*Held*, that the plaintiffs were competent to sue in rem in the Admiralty Court; but in order to protect the defendants from the possibility of another suit by other parties on the same subject, the Court directed that the money awarded as compensation for the damage should not be paid until it should be satisfactorily established that such payment would release the defendants from all claims by the owners of the barge in respect of the collision.

THIS was a cause of damage instituted by Francis Giles Henwood, Edward John Anderson, and Jeffrey William Ludlam, bailees of the barge *Moral*, against the steamship *Minna*, in respect of a collision which occurred on the 28th of March, 1867, off St. Katharine's Wharf, whereby the barge was sunk.

The *Minna* was at the time of the collision in charge of a licensed Trinity pilot, whose employment was compulsory upon her owners.

It appeared by the pleadings that the plaintiffs had hired the barge upon the terms that she was to be at their risk, and to be returned by them to her owners in as good condition as she was in when delivered to the plaintiffs; and that the cargo was in the possession of the plaintiffs as carriers, they being bound to deliver such cargo to the owners thereof in the same condition as when delivered to the plaintiffs.

March 4. *Dr. Deane, Q.C.*, and *Butt*, for the defendants, contended that the petition was bad, on the ground that it disclosed no right or title in the plaintiffs to maintain the action.

*Sir W. B. Brett, Q.C. (S.G.)*, and *Clarkson*, for the plaintiffs, contra.

SIR ROBERT PHILLIMORE. I think it was very proper to take the opinion of the Court upon this point, but after a little consider-

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ation, no difficulty presents itself to my mind. It is admitted that the liability to damage would accrue in any common law court, and the only question really before the Court is, whether the fact of the proceedings being in rem can make any difference? It has been suggested, as a reason why it should make a difference, that the defendants might be harassed by various actions; one by the bailees, and another by the owners. The Court will provide against such a contingency as that, by following the precedent of the *Ilos* (1), and take care, in the event of the defendants being found to blame for this damage, that the sum assessed shall not be paid without reasonable security, that the owners, as well as the bailees, consent to the appropriation of this sum. It is not necessary that I should state the exact way in which that should be done, but the Court will take care that justice shall be done between the parties.

The cause was then heard by the Court and Trinity Masters.

*Cur. adv. vult.*

March 5. SIR ROBERT PHILLIMORE. This is a case of collision between a barge rowed by oars, and the screw steamship *Minna*.

The barge, laden with iron pipes, and rowed by two men, was proceeding from Stockton Pier, in the Thames, to the East India Docks, about eight o'clock on the 28th of March last; the weather was fine, the tide was ebb, and running strongly. The barge had arrived abreast of the iron gate tier above Saint Katharine's Dock on the north shore, where there are three buoys, which may be called upper, middle, and lower. The barge is proved to have been at this time about mid-channel, with her head nearly straight down the river. Having arrived at this place, the five witnesses produced on her behalf, viz., the two boatmen, two men from lighters going also down the river, and a stevedore on board a steamer lying not fifty yards off from the place of collision, depose in effect that the *Minna* came from the middle buoy stern foremost into the river, backing astern with her engines, with a rope fast to the middle buoy from her quarter, her head being then towards the north shore. Those on board the barge hailed her to "stop,"

(1) Swab. 100.

and "check herself," a fact admitted by the master of the *Minna*, who, however, swore that he answered the hailing. But the witnesses on board the barge say, that receiving no answer, they endeavoured to run over to the south side. The *Minna*, however, kept backing out. The barge was then, in order to ease the blow, or receive it as much aft as possible, when the collision was inevitable, turned up the river. Shortly afterwards the stern of the *Minna* struck the barge, which almost immediately sank.

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The *Minna's* case is, that she was outward bound, with goods and passengers from London to Cork, being a vessel of 532 tons register, and having a crew of twenty-six hands; that she had been fastened by ropes from her starboard and port quarters to the buoy; that between seven and eight in the morning a duly licensed pilot came on board, and took charge; that one rope had been taken in before he came on board; that the other was slacked away under his orders; that the *Minna* was canted out into the stream with her helm aport, and the master swears that the engines were not in motion at the time of the collision, and that the steamship had no sternway on her at all; and the pilot says she was "just moving," by way of trying her engines, and that was all. The engineer swears that he had reversed the engines for a minute and a half or more before the collision.

The whole result of the evidence however satisfied me, and the gentlemen by whom I am assisted, that the *Minna* had some sternway on her at the time of the collision, and that the barge was struck with considerable violence. There are two facts of importance established by the evidence produced on behalf of the *Minna*. 1. Her master swears that when he first saw the barge (and he was the first man who did see it), it was at a distance of three times the length of his own vessel, the measure of which is 240 feet, and that she was then broadside down the river, with her head south; and it is clear that at this time the stern of the *Minna* was still canting out into the river. 2. The pilot swears that he never saw the barge till she was nearly athwart the stern of the *Minna*. Upon the whole case the Court, with the assistance of the Trinity Masters, has arrived at the following conclusions with respect to the *Minna* :—

First: That it was the duty of the *Minna*, in her position, to

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 THE MINNA, move her engines.

Secondly: That if she had done so, the barge would have been discerned at such a distance as would have enabled the *Minna* to have taken proper precautions to avoid the collision. The result, therefore, is, that she had not a proper or sufficient look-out.

Thirdly: We are satisfied that when the *Minna* did move her engines, it was not for the mere purpose of "trying them," as suggested by the pilot, who, it appears, perfectly well knew the steamship, but for the purpose of coming out into the river.

With respect to the barge, we are of opinion:—

First: That the barge was not to blame on the ground of deficiency of strength, but that she was properly manned.

Secondly: That she was right both in coming straight down the river, as we believe she did; and when the collision seemed inevitable, in attempting to go to the southward, and also in endeavouring, by turning her head up the river upon the tide, to ease the severity of the blow by receiving it as much aft as possible.

The result is, that we are of opinion that the *Minna* was solely to blame for the collision.

The question remains, whether the owners are exempt from their liability as wrong-doers, by the fact of their having a duly licensed pilot on board? (1) The Court is of opinion that the pilot ought to have had sufficient notice given to him by the master of the position and approach of the barge, and that he had not such notice. The Privy Council have laid down in the case of the *Iona* (2) this principle:—"Now in construing those acts (viz., the 17 & 18 Vict. c. 104, s. 388, and the Pilotage Act, 6 Geo. 4, c. 125, s. 55), it has been established as a principle that in order to entitle the owners to the benefit of the exemption from liability thereby provided, they must prove that the damage, for which it is sought to make them liable, was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negli-

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 388, provides that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of

any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

(2) Law Rep. 1 P. C. 426, 432.



gence in the pilot; they must prove, to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them which might have been, in any degree, conducive to the damage." Applying this principle to this case, the Court is of opinion that this neglect of duty on the part of the master conduced to the collision, and that the owners are therefore responsible for the damage caused by the collision, and I pronounce accordingly.

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I think it right to observe that a preliminary objection was taken in this case to the competence of the plaintiffs to institute this suit, on the ground that they were mere bailees, and that there was no precedent for allowing bailees to proceed in rem in this Court, though it was admitted that they had sufficient interest to sustain an action at common law. I overruled this objection; and now, in order to protect the owners of the *Minna* from the possibility of another suit from other parties on the same subject, I direct, as I intimated that I should do, following the precedent of the *Ilos* (1), that the money, awarded by the registrar and merchants as compensation for the damage, be not paid until it shall have been satisfactorily established that the payment will release the owners of the *Minna* from all claims on behalf of the owners of the barge in the matter of this collision.

Attorneys for plaintiffs: *Stibbard & Beck*.

Attorneys for defendants: *Ellis, Parker, & Clarke*.

(1) Swab. 100.

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April 24.

## THE LION.

*Collision—Compulsory Pilotage—17 & 18 Vict. c. 104, ss. 303, 354—  
“Passengers.”*

The payment of a fare is necessary to constitute a passenger within the meaning of the 354th section of the Merchant Shipping Act, 1854, which imposes upon a “ship carrying passengers” the obligation of taking a pilot on board.

Where a wrongdoing vessel in charge of a licensed pilot had on board at the time of the collision two persons whom the captain had taken as visitors, but who subsequently paid for their passage:—

*Held*, that the owners were not exempt from liability by reason of their having a pilot on board at the time of the collision.

*27th 2 PC. 525*  
**COLLISION.** On the 8th of December, 1867, the English screw steamship *Lion*, the vessel proceeded against, came into collision with the American vessel *York Town*, off the East India Dock Buoy, in the river Thames.

The *Lion* was bound to Hull, in ballast, in charge of a licensed pilot, named West, and had on board besides the crew, the master's wife and father-in-law, who were alleged to be passengers, and with respect to whom the following evidence was given at the hearing of the cause:—

The pilot swore, on his examination, that he came on board in the capacity of waterman, and not of pilot; that the *Lion* did not appear to have any passengers on board; that he saw the captain's wife; that he was informed by the captain that the ship was going home in ballast; and that he took charge, along with the captain, in the usual way.

The captain of the *Lion* deposed, that the usual trade of the vessel was from Hull to St. Petersburg; that he had commanded her in five voyages; that he had come from St. Petersburg to London with passengers; that this was the first time that he had been in the port of London; that he was going to Hull in ballast, according to his instructions, there to load a cargo for Havre; and that West took charge of the ship as pilot. He swore that he had two passengers on board, as to whom his evidence, on the whole, was as follows:—That, having been seven days in London, he wrote to his wife and to his father-in-law to come to London, and

go with him to Hull; that he did not write to the owners, or tell their agents in London, or anybody, that he was going to take these persons with him; that they paid nothing for their living on board the ship, but that they paid for their fare, in the circumstances about to be mentioned, 7s. 6d. each, which he swore positively was the proper second-class fare, though Malcolm, the agent for the owners of the *Lion*, as positively swore afterwards that it was the first-class fare. For this money no receipt was produced, though the captain swore that he paid it, and Malcolm that he received it. He admitted that he had said nothing to either of these persons, previously to their coming on board, as to their payment of fare; that, he said, "he arranged during the passage," but after the collision had happened.

The father-in-law swore that the first time he ever spoke about his paying was when he was in Hull, and the ship alongside the quay.

The captain admitted, on cross-examination, and in answer to the Court, that he was aware that he was bound to pay light-dues unless he went in in ballast without passengers on board; that he ought to have told the lighthouse authorities that he had passengers on board; and that he had not done so. He said that he paid the fares to his owners on his arrival in Hull, but Mr. Malcolm said that "the settlement," as he called it, was made about the middle of January. The captain also swore, and in this was confirmed by Malcolm, that his instructions were never to take persons on board without payment as passengers, except with special permission.

It was admitted that the *Lion* was to blame for the collision, but the question was raised whether under the circumstances the owners were exempt from liability for damages, under ss. 303, 354, of the Merchant Shipping Act, 1854. (1)

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) enacts:—

Section 303:—"For the purpose of the enactments herein contained with respect to surveys and certificates of passenger steam-ships, the word 'passengers' shall be held to include any persons carried in a steamship, other than the

master and crew, and the owner, his family and servants; and the expression 'passenger steamer' shall be held to include every British steamship carrying passengers to, from, or between any place or places in the United Kingdom, excepting steam ferry-boats," &c.

Section 354:—"The master of every

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*Sir W. B. Brett, Q.C. (S.G.), and Butt*, for the plaintiffs. The *Lion* was not bound to take a pilot. The vessel was usually employed between Hull and St. Petersburg. On this occasion only she went from London to Hull, and her captain had no instructions to take passengers. The captain's father-in-law went only as a visitor; payment was an afterthought when the ship arrived at Hull, and would never have been thought of if there had been no collision.

*Milward, Q.C., and Clarkson*, for the defendants, argued that the vessel was, at the time of the collision, a home trade ship carrying passengers. A "passenger" is one who has nothing to do with the control of the ship, not being the owner or his family. The expression "family and servants" in the 303rd section of the Merchant Shipping Act, 1854, means the family and servants of the owner, not of the captain.

*Butt* replied.

*Cur. adv. vult.*

April 24. SIR ROBERT PHILLIMORE. The evidence in this case established beyond all doubt, that the *Lion* was alone to blame for the collision. The counsel for the *Lion* very properly admitted the fact; and I dismissed the Trinity masters, therefore, without putting any questions to them.

There remained two questions for the consideration of the Court: 1. Whether at the time of the collision, the *Lion* was under the charge and control of a duly licensed pilot. 2. Whether it was compulsory upon the *Lion* to take a duly licensed pilot?

The pilot's name was West, and it appeared that he had two licenses; one, a waterman's license obtained from Waterman's Hall, another a regular license from the Trinity House, authorizing him to exercise the office of a pilot for home trade passenger ships, for a certain distance in the Thames, within the limits of

ship carrying passengers between any place situate in the United Kingdom, . . . and any other place, so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority, . . . or upon

any part thereof so situate, shall, unless he or his mate has a pilotage certificate, . . . employ a qualified pilot to pilot his ship; under a penalty not exceeding One Hundred Pounds,"



which the collision happened. [The learned judge then stated the evidence, and read the sections of the Merchant Shipping Act as above set out, and continued]:—I must come to the conclusion that this ship was under the charge of a duly licensed pilot; and the second question therefore alone remains,—whether the captain was or was not compelled to place his ship under the charge of a pilot—which is, in other words, whether these two persons, the wife and father-in-law of the captain, were or were not passengers? There is no definition of the term “passenger” in the Merchant Shipping Acts. For the limited and particular purpose of surveys and certificates of passenger steamships, it has been enacted by s. 303 that the word shall include any person other than the master and crew, the owner, his family and servants. The legitimate inference from this enactment would seem to be, that persons other than the master and crew, the owner, his family and servants, would not have been necessarily considered by the law as passengers, and that it required this enactment to give them that character, which it only impressed upon them for the particular purpose which it mentioned. If I look to the Passenger Acts, the latest of which is 18 & 19 Vict. c. 119, the payment of fare would appear to be a necessary incident for the constitution of a passenger in the legal sense of the term, both as to his rights and duties. The Passenger Acts still leave a large proportion of passenger traffic under the common law. But I think the common law connects the payment of fare with the status of a passenger. It has been suggested that the protection of life was the object of the statute in rendering the pilot necessary, but this seems to me too broad a proposition. The protection of the lives of the crew is as important as the protection of the life of the passenger; and I think that the obligation to take the pilot was imposed by the legislature on the ground that the owner, if he made profit out of carrying a person not being one of the crew, should, in return, give him the protection which the skill and knowledge of the pilot could afford. It, I believe, not unfrequently happens that persons have secreted themselves on board a vessel, and have not been discovered till she was out at sea. In such cases it would be impossible to hold that there was an obligation on the vessel to take a pilot when she came into a river, roadstead, or port, in

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which it would be incumbent upon her to take a pilot if she had passengers on board. Upon the whole, I think that the payment of a fare is necessary to constitute the class of passenger whose presence on board the ship imposes the obligation of taking a pilot on board. But then arises another question—whether the payment of the fare of these two persons, whensoever made, did not clothe them with the character of passengers? This question must be answered with a regard to the rights of third parties in this case. When the *Lion* unlawfully injured the *York Town* by running into her, she incurred an obligation ex delicto—in other words, the *York Town* had from that moment a lien upon her for reparation of the damage which she had tortiously caused. The liability which existed at that time could not, in my opinion, be got rid of by a subsequent act on the part of the wrongdoer, having for its object to convert these two persons into passengers for the purpose of placing himself under the exemption from liability, which the compulsory presence of a pilot on board his vessel at the time of the collision would have afforded. I pronounce for the damage, and that the *Lion* is not exempt from payment by reason of having a compulsory pilot on board at the time of the collision.

Attorneys for plaintiffs: *Ellis, Parker, & Clarke.*

Proctors for defendants: *Clarkson, Son, & Cooper.*

April 21.

#### THE FIGLIA MAGGIORE.

*General Ship—Right of Assignee of Bill of Lading to Sue—Charterparty—18 & 19 Vict. c. 111, s. 1; 24 Vict. c. 10, s. 6—Damage to Cargo—Onus probandi—Improper Stowage of Oilcake and Tobacco.*

The plaintiffs were assignees for valuable consideration of bills of lading for 1000 barrels of oilcake shipped on board the *Figlia Maggiore*, at New York, and which the master had agreed “to deliver in like good order and condition at the port of London.” The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oilcake was stowed with hogsheads of tobacco, oaken staves being placed between them.

A suit having been brought by the plaintiffs against the shipowner for damage suffered by the oilcake on the voyage:—

*Pon 277*  
*348*  
*376-0*

*Held*, that as the vessel had been put up as a general ship, and as the plaintiffs had no knowledge of the charterparty, the owner was the proper person to be sued :

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That the property in the oilcake had so vested in the plaintiffs as to entitle them to sue for breach of contract under s. 6 of 24 Vict. c. 10, construed with s. 1 of 18 & 19 Vict. c. 111, and that, in any case, they were entitled to sue under the former section on the ground of negligence :

That the onus of proving negligence lay on the plaintiffs :

That the mode of stowage of the oilcake and tobacco was unknown to the plaintiffs, and that the damage, however caused, was occasioned by the negligence or misconduct, as well as by the breach of contract, on the part of the defendant and his servants.

DAMAGE to cargo. This was a suit instituted under the 6th section of the Admiralty Court Act, 1861. (1) The plaintiffs were Messrs. Simmonds, Hunt & Co., the assignees for valuable consideration of bills of lading for 1000 barrels of oilcake, which were shipped on board the *Figlia Maggiore*, at New York, by Messrs. Holgate & Co., merchants of that city, about the 26th of June, 1865.

The vessel belonged to Ambrogio di C. Ralli, of Trieste; the captain's name was Millosevich. He agreed, on behalf of the owner, "to convey to, and to deliver in the like good order and condition at, the port of London, the said barrels (the dangers of the seas only excepted), unto order, freight being paid for the said oilcake at the rate of 17s. 6d. per ton, with 5 per cent. primage;" and he signed the usual bills of lading for the same.

The ship arrived in the Victoria London Docks about the 29th of August in the same year; and the captain delivered to the plaintiffs the 1000 barrels of oil-cake, and received the freight and primage due thereon.

The plaintiffs alleged in their petition, that the barrels of oilcake when so delivered, "were not in the like good order or condition as when the same were delivered to the captain, but, on the contrary, the same were in a greatly heated and otherwise injured and damaged condition;" and that this injury and damage "was caused or occasioned by the negligent and improper conduct of the

(1) 24 Vict. c. 10, s. 6: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damages done

to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship," &c.

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said Millosevich and others acting under or by his directions, in and about the stowage and ventilation of the said oilcake, and not by the dangers of the seas." In addition to these two averments of fact, the plaintiffs stated, that "the said damage was occasioned by a breach of contract or of duty on the part of the defendant."

The defendant denied generally the averments of the Petition, and with respect to the facts of the case alleged specially as follows:—

"2. On the 13th of June, 1865, the *Figlia Maggiore*, then lying at New York, was chartered by G. Millosevich, her master, to Messrs. Ruger Brothers, merchants, of New York, for a voyage to London. By the charter it was provided, amongst other things, that the charterer should furnish a full and complete cargo of 500 hogsheads of tobacco, and balance of cargo, assorted merchandize, and staves for dunnage, captain to have the privilege to take deckload of staves. Bills of lading to be signed without prejudice to the charter.

"In pursuance of this charter, a full cargo was taken on board, furnished by the said charterers, but shipped by different shippers, consisting of the following:—

556 Hogsheads Tobacco,  
18,000 Staves,  
40 Cases Merchandize,  
1,000 Barrels Oilcake.

The 1,000 barrels oilcake just mentioned are the barrels of oilcake in respect of which this action is brought. The master of the *Figlia Maggiore*, in pursuance of the charter, signed the bill of lading in respect of them, copy of which is annexed to the petition.

"4. The whole of the said cargo, including the 1,000 barrels oilcake, was stowed in a usual and proper manner, and usual and proper care thereof was taken throughout the voyage.

"5. On or about the 16th day of August, 1865, the whole of the said 1,000 barrels were delivered to the plaintiffs in good order and condition and freight paid thereon.

"6. The damage to the said oilcake (if any) was not caused as



in the petition alleged, or otherwise by the negligence of those on board the *Figlia Maggiore*, or by any breach of contract or duty on the part of the defendant.

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"The damage to the said oilcake, if any, was occasioned by the natural heating qualities of the said oilcake."

The defendant also raised by his answer two questions of law; he averred that—

"8. The contract contained in the bill of lading was, in the circumstances hereinbefore stated, between the shippers and the charterers, and not between the shippers and the defendant, and that neither the ship of the defendant nor the defendant was liable for any breach of the said contract.

"9. The property in the said oilcake did not pass to the plaintiffs by the indorsement of the bill of lading, and the plaintiffs are not entitled to sue in respect of the said bill of lading."

The reply on behalf of the plaintiffs, besides a general denial of the averments contained in the answer, pleaded:

"2. At the times when the 1,000 barrels of oilcake in the petition mentioned were shipped by Messrs. Robert Holgate & Co. on board the *Figlia Maggiore*, and her master signed the bills of lading for the same, as in the petition mentioned, the *Figlia Maggiore* had been and was put up as a general ship, and neither the said Messrs. Holgate & Co., nor the plaintiffs, had at such respective times any notice or knowledge of the alleged charterparty in the answer in this cause mentioned, or that the *Figlia Maggiore* had in fact been chartered, or that the master of the *Figlia Maggiore*, in accepting the shipment of the said oilcake and signing the said bills of lading, was acting otherwise than as agent for her owner."

The hearing of the cause occupied three days—the 26th, 27th, and 28th of February. The results of the evidence, the points insisted upon by counsel, and the authorities cited, will be found fully stated in the judgment.

*Sir W. B. Brett, Q.C. (S. G.), and Clarkson, for the plaintiffs.*  
*Milward, Q.C., and Lushington, for the defendant.*

April 21. SIR ROBERT PHILLIMORE gave judgment. [After stating the facts as above]:—With respect to the first point of law

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raised—viz., that the contract in the bill of lading was between the shippers and the charterers, and not between the shippers and defendant, therefore that the defendant was not liable for a breach of the contract—it was properly admitted by the counsel for the defendant, that inasmuch as the *Figlia Maggiore* had been put up by the master as a general ship, and as the plaintiffs had no knowledge of the charterparty, the cases of *Sandeman v. Seurr* (1) and the *St. Cloud* (2), decided by my predecessor, were directly opposed to his contention; and as I shall certainly follow the authority of those cases, I am of opinion that the proper defendant is before the Court in this case. I have next to consider the right of the plaintiffs to sue the defendant in this Court. They claim, as indorsees for valuable consideration of the bill of lading, under s. 6 of 24 Vict. c. 10, to sue the defendant, first for negligence, and, secondly, for breach of contract. I will deal first with the second ground. The defendant contends that the indorsees are not entitled to the property in the oilcake, so as to enable them to sue upon the contract. There is no doubt that, previously to 18 & 19 Vict. c. 111, the indorsement and delivery of the bill of lading transferred to the indorsees the property but not the contract of the shippers, and that, therefore, at common law, though they might have sued the owners or the master for what is technically called the conversion, they had no action against them upon the contract for non-delivery of the goods. It is true that by s. 6 of 24 Vict. c. 10, this Court has jurisdiction “over any claim by the owner, or consignee, or assignee of any bill of lading of any goods” carried into any port of this country, for damage on the ground of negligence or breach of contract on the part of the owners, master, or crew; but my learned predecessor, in the case of *The St. Cloud* (3), decided that an assignee was not entitled to sue under the statute in this Court, because the words “any claim” must be interpreted to mean “any claim lawfully existing independently of this Act;” and to that decision I adhere. Now, as it has been stated, such a claim did not exist by the common law. But by the statute 18 & 19 Vict. c. 111, s. 1, it is enacted that “Every consignee of goods named in a bill of lading, and every

(1) Law Rep. 2 Q. B. 86.

(2) Brow. &amp; Lush. 4.

(3) Brow. &amp; Lush. at p. 18.

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indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." The defendant contends that the words, "to whom the property in the goods therein mentioned shall pass," require that all the property should pass to the indorsee, in order to place him in the position of the original shipper or owner; and the case of *Fox v. Nott* (1) was cited in support of this proposition. But I am of opinion that this judgment only decided that the statute was not intended to deprive an owner, who had made advances on the security of the bill of lading, of the benefit of the original contract of the shipper to pay the freight in the case where the shipper's agent, who shipped the goods, had personally contracted to pay the freight. One of the judges (Bramwell, B.) was of opinion that the statute had no bearing at all upon the case; the other judges thought that the act only applied to the absolute transfer of the goods; and Martin, B. said that the statute meant "an actual vesting of the property as by bargain and sale." (2)

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In the case before me the bill of lading had been delivered to the plaintiffs with a bill of exchange, which they had accepted and paid; and it appears to me that, in these circumstances, the consignees had intended to vest the property in the indorsees. In the case of *Lickbarrow v. Mason* (3) Mr. Justice Buller, referring to the case of *Godfrey v. Furze*, observes:—"The Lord Chancellor says, when a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and, consequently, they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy." And Mr. Justice Buller

(1) 6 H. &amp; N. 630.

(2) 6 H. &amp; N. at p. 637.

(3) 1 Sm. L. C. 418, 9.

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adds: "The whole of this case is clear law." And, dealing with the question of the factor, he says: "I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance or under acceptance on account of the goods is simply and merely a servant or agent, for which no authority has been, or, as I believe, can be, produced." I am of opinion that if the two statutes—18 & 19 Vict. c. 111, and 24 Vict. c. 10—are to be construed together, and the indorsee of the bill of lading, in order to sue in the Admiralty Court, under s. 6 of the latter statute the owner for a breach of contract, must be an indorsee to whom the property in the goods has passed according to the former statute, the plaintiffs are entitled to sue in this capacity. But if I am wrong upon this point, I am clearly of opinion that upon the other ground, viz., the negligence mentioned in s. 6, they are entitled to sue.

A question has been raised as to the party on whom the onus probandi is to be thrown in this case. In the case of the *Hélène* (1), which also arose under the 6th section of this Act, decided in this Court, but reversed on appeal before the Privy Council, the assignees of the bills of lading for certain casks of oil shipped on board the *Hélène*, sought to recover damages for loss incurred by the leakage of the oil on the voyage, occasioned, as alleged by the assignees, by the negligence and breaches of contract and duty of the owners. In the margin of the bill of lading of the casks of oil in that case there was this memorandum: "Weight, measurement, and contents unknown, and not accountable for leakage;" and it was ruled that the plaintiffs, in order to entitle themselves to the action, were bound to give satisfactory proof that the leakage was caused by the negligence of the shipowners. And the subsequent case of *Czech v. General Steam Navigation Company* (2), where the bill of lading contained an exception from liability for "breakage, leakage, or damage," the same doctrine seems to have been held by Bovill, C.J.; but in both these cases it would seem—though, perhaps, the proposition is not distinctly stated—that the burden of proof was thrown upon the plaintiffs, on account of the special memorandum or exception which accom-

(1) Brow. &amp; Lush. 415; and on appeal, 429.

(2) Law Rep. 3 C. P. 14.



panied the bill of lading. In the case of the *Norway* (1), in which it was alleged that the jettison of a portion of the cargo had been caused by the grounding of the ship in consequence of the negligence of the pilot, it was contended that the plaintiffs were bound to establish that the injury thereby sustained by the vessel was either the *causa proxima* or *causa causans* of the jettison, but no decision appears to have been come to on this point by their lordships. Assuming, however, that it is incumbent on the plaintiffs to establish a *primâ facie* case of negligence against the master, the proposition, to borrow Justice Willes' expression in *Czech v. General Steam Navigation Company* (2), "does not restrict the plaintiffs as to the nature of the evidence by which such negligence shall be proved." I think it can scarcely admit of doubt that a *primâ facie* case of negligence has been established by the evidence, and the real question which the Court has to consider is, whether that *primâ facie* case is displaced by the evidence produced on behalf of the defendant.

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The evidence taken by commission at New York on behalf of the plaintiffs seems to me, on the whole, to establish these facts: that the oilcake was of superior quality as to its manufacture; that it was dry and in good condition at the time it was packed. Dryness appears to be, I may observe, the principal object which it is expedient to attain, indicating, I presume, that the oil has been sufficiently pressed out before the packing takes place. The plaintiff, in his evidence taken before me, said: "the quality of the oilcake depends on the manner in which the oil is expressed."

[The learned judge then stated the evidence respecting the condition of the oilcake at the time of its delivery, and continued:]

Upon the evidence at present referred to the Court must arrive at two conclusions—first, that the oilcake was shipped in proper order and condition; and, secondly, that it was received in a state of deterioration considerably beyond the usual average. The important question is, to what cause or causes this deterioration is to be ascribed—to the improper stowage in connexion with the hogs-

(1) *Brow. & Lush.* 226, 377; and on appeal, 404.(2) *Law Rep.* 3 C. P. at p. 19.

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heads of tobacco and the staves of oak, and the want of proper ventilation, as the plaintiffs contend; or to the nature of oilcake generally, or of this particular oilcake, as the defendant contends. There is one matter which lies in limine, which I must dispose of: it is contended by the defendant that it is not competent to the plaintiffs now to object to the stowage of tobacco with the oilcake and staves, because they must be taken to have been aware of the fact, and not to have remonstrated, at the time when the oilcake was shipped. The witness Stutchbury, master of the lighter in the employ of Holgate & Co., gives this evidence: "I saw them take twenty or thirty hogsheads of tobacco into the *Figlia Maggiore*. They placed them down into the hold ready to be stowed. After the tobacco was put down in the hold, then they put in 500 barrels of oilcake into the hold; then put in more hogsheads of tobacco. I also saw them put staves into the ship. There were some staves down in the hold before any tobacco or oilcake was put in. The manner of stowing that I saw was this: they stowed a hogshead of tobacco, and put barrels of oilcake around and about it, and placed the staves in between the hogsheads and barrels. This I saw myself." In cross-examination, however, in answer to the question: "Did you at any time say anything to your employers as to the manner in which the oilcake was stowed?" he said, "No, I did not." I am of opinion that this objection on the part of the defendant cannot be sustained, on the ground that, if the lighterman were to be considered as the agent of the plaintiffs, the absence of remonstrance on his part with respect to the tobacco and staves which he did not ship—a circumstance which distinguishes this case from that of the *Hélène* (1)—did not remove the responsibility of the shipowners as to the safe carriage of the oilcake, and on the ground that he was not the agent of the shippers for this purpose; and, lastly, that, according to his own statement, he never communicated the fact to the shippers. And there is no evidence in the case of their being affected with any knowledge of it.

I return to the consideration of the evidence as to the cause of the deterioration of the oilcake. The defendant has produced several witnesses who have commanded large vessels, "liners," who

(1) Brow. & Lush, 415; on appeal, 429.

say that they have been in the constant habit of carrying oilcake with tobacco, of stowing the cargo indiscriminately, taking no precaution against the heating of the oilcake by ventilation or otherwise; and the stevedore Westhorpe gives evidence as to the practice of stowing tobacco, oilcake, and staves in vessels of this description, and it is asked by the counsel for the defendant whether I intend, by my decision, to alter the practice of the trade between New York and England in this respect. The answer to this is twofold. In the first place, the plaintiff Simmonds says that this is a practice which his firm have always protested against; and, in the second place, it is a practice which the shipowner adopts suo periculo—he cannot, by the adoption of it, get rid of his obligation to carry the goods of a shipper in proper condition. It may be that, in certain circumstances, and in vessels of a certain size, tobacco and oilcake may be stowed together without injury; but in a case where injury to a very considerable extent, as it is alleged in the present case, does arise from the joint stowage of these articles, it does not appear to me that the shipper can be deprived of his remedies against the shipowner on the ground that such stowage is usual, and that in many cases, or generally, no injury accrues from it. The alleged practice, therefore, can have but little weight in influencing my decision. The following causes of deterioration are suggested:—First, the mode of stowage, with which is connected the important question of ventilation; secondly, the heat generated by the tobacco and the staves; and, thirdly, the heat generated by the oilcake itself. [After stating the evidence on both sides:—] With respect to the cause of the heat, whether it was generated by the tobacco and staves or by the oilcake itself, the material evidence appears to be as follows,—that oilcake has in its own nature a liability to heat, that liability greatly depending upon the condition and quality of the oilcake when put on board. It appears, further, that oilcake is susceptible of injury from the neighbourhood of a heating cargo of other goods. The oilcake, being thus susceptible of heat, what is the evidence as to the properties of the tobacco close to which it was packed? [After stating the evidence in detail]:—Now, that tobacco is a cargo which is always heating of itself, and the known process of which is to sweat, is an indisputable inference from the evidence before me. The evidence, I

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think, upon the whole also establishes that the mould in these oil-cakes was from the edges to the centre, and that this is the usual indication that the mischief has been produced by external heat. I find it difficult to come to any satisfactory conclusion with respect to the effect produced by the packing of the staves. Upon the whole, I am of opinion that the damage done to the barrels of oil-cake, whether in consequence of the stowage and neighbourhood of the tobacco or bad ventilation, or both, was occasioned by the negligence or misconduct, as well as by the breach of contract, on the part of the defendant and his servants; and I must refer the claim of the plaintiffs to the registrar and merchants to report thereon, and must condemn the defendant in the costs of these proceedings.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*

Attorney for defendant: *Kearsey.*

March 28.

[IN THE ARCHES COURT.]

MARTIN *v.* MACKONOCHE.  
FLAMANK *v.* SIMPSON.

*Book of Common Prayer—Rites and Ceremonies—Elevation of the Sacrament—Excessive Kneeling—Incense—Mixed Chalice—Lighted Candles on Communion Table.*

The terms rite and ceremony as used in the prayer-book are terms of ecclesiastical and ritual art, and are to be construed with reference to their use in the works of writers on ritual unless they receive a different meaning from a comparison of other passages or parts in the prayer-book or statute in which they are found.

There is a legal distinction between a rite and a ceremony; a rite consists in services expressed in words; a ceremony in gestures or acts preceding, accompanying, or following the utterance of those words.

The elevation of the sacrament of the Lord's Supper accompanied by kneeling at times not prescribed by the rubrics, the use of incense during the celebration of the eucharist, the mixing of water with wine at the time of the administration of the Lord's Supper, the use of lighted candles upon the holy table, are in law ceremonies, and belong to the category of ceremonies designated "mutable."

The criterion of the legality of such ceremonies is in their conformity with primitive and catholic use, and not in their antagonism to Rome.

The mere fact of their identity with the ceremonies in use before the Reforma-

3PC 62  
3A-8-6073  
-7979  
4A-8-283  
— 359  
— 396  
PD 323  
PD 135  
4QBD 247  
— 584.571  
6PD.57.

4QBD 706



tion is not sufficient ground from which to deduce their unlawfulness, nor does the fact that a practice is novel prove that it is unlawful.

Things neither ordered nor prohibited expressly or by implication in the prayer-book are within the domain of the bishop of the diocese within which they occur, *MARTIN v. MACKONOGHIE*, to deal with by monition.

Therefore, where a clerk in holy orders was charged with excessive kneeling (though not for the purpose of adoration) during the prayer of consecration :—

*Held*, that as the rubric gives no precise directions as to kneeling at that time, the charge was one which ought not to have formed the subject of a criminal prosecution, but ought to have been referred to the bishop in order that he might exercise his discretion thereupon. (11)

It is unlawful for a clerk in holy orders to elevate the paten and cup above his head after consecration during the celebration of the holy communion.

To bring in incense at the beginning or during the celebration, and remove it at the close of the celebration of the eucharist, is a distinct ceremony, additional and not even indirectly incident to the ceremonies ordered by the prayer-book ; and is, therefore, illegal.

It is illegal to mix water with the wine during the celebration of the eucharist ; but

*Quære*, whether it is illegal to administer to the communicants wine with which a little water has been previously mixed.

The lawfulness of placing two lights upon the holy table is established by the injunctions of Edward VI. (1547).

It is, therefore, lawful to place two lighted candles on the holy table during the time of the holy communion, "for the signification that Christ is the very true light of the world." (12)

*See in Mo M. as far as agt promoter need in PC & P. 117*  
*as to 117*  
 These cases came before the Court by letters of request from the Bishops of London and Exeter, respectively, under the provisions of the 3 & 4 Vict. c. 86.

The articles exhibited against the Rev. A. H. Mackonochie, the defendant in the first case, contained in their finally amended shape the following allegations :—

1. That by 1 Eliz. c. 2, the 13 & 14 Charles II. c. 4, and the 28 & 29 Vict. c. 122, and by the 14th, 36th, and 38th of the constitutions and canons ecclesiastical, treated upon by the Bishop of London, President of the Convocation for the Province of Canterbury, and the rest of the bishops and clergy of the said province, and agreed upon with the licence of his Majesty, King James I. in their synod begun at London in the year of our Lord 1603, and ratified by his said Majesty's letters patent under the Great Seal of England, all clerks and ministers in holy orders are, among other things, bound to say and use the Book of Common Prayer, and administration of the sacraments and other rites and ceremonies

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*Ann sent agt same deflt & by same promoter*  
*LR 4 Q & 8. 279.*

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of the Church, according to the use of the United Church of England and Ireland, and that any clerk or minister in holy orders offending against the said statute, law, constitutions, and canons, ought to be punished according to the gravity of his offence, and the exigency of the law.

2. That Alexander Henry Heriot Mackonochie was and is a clerk in holy orders of the United Church of England and Ireland, and was during the entire of the year 1866 the lawful incumbent and perpetual curate of the new parish of St. Alban's, Holborn, in the county of Middlesex, diocese of London and province of Canterbury, and has ever since been and now is the lawful incumbent and perpetual curate of the said parish or ecclesiastical district.

3. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866, during the prayer of consecration, in the order of the administration of the holy communion, elevated the paten above his head, and permitted and sanctioned such elevation, and taken into his hands the cup, and elevated it above his head during the prayer of consecration aforesaid, and permitted and sanctioned the cup to be so taken and elevated, and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling and prostrating by other clerks in holy orders.

4. That such elevation of the paten, and such taking and elevation of the cup, and such kneeling and prostrating are severally unlawful additions to, and variations from, the form and order prescribed and appointed by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and are contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons, and also to an act of parliament passed in the thirteenth year of Queen Elizabeth, c. 12, and to the 25th and 28th of the articles of religion therein referred to.

5. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 23rd

day of December, on Christmas Day last past, on Sunday, the 30th day of December, all in the year of our Lord 1866, and on Sunday, the 13th day of January, in the year of our Lord 1867, used lighted candles on the communion table during the celebration of the holy communion at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

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6. That the use of such lighted candles is an unlawful addition to, and variation from the form and order prescribed and appointed by the said statutes and by the said Book of Common Prayer, and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes and to the 14th, 36th, and 38th of the said constitutions and canons.

7. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866, used incense for censuring persons and things in and during the celebration of the holy communion, and permitted and sanctioned such use of incense.

8. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 13th day of January, in the year of our Lord, 1867, unlawfully used incense in and during the celebration of the holy communion, and permitted and sanctioned such unlawful use of incense.

9. That such use of incense as in the two preceding paragraphs alleged are severally an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes and by the said Book of Common Prayer and administration of the sacraments and other rights and ceremonies of the Church, and are contrary to the said statutes and to the 14th, 36th, and 38th of the said constitutions and canons.

10. That the said Alexander Heriot Mackonochie has in his said church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, on Sunday, the 30th day of December, all in the year of our Lord 1866, and on Sunday, the 13th day of January, in the year of our Lord 1867, during

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the celebration of the holy communion, mixed water with the wine used in the administration of the holy communion, and permitted and sanctioned such mixing and the administration to the communicants of the wine and water so mixed.

11. That such mixing and administration of the wine and water is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 20th, 21st, 36th, and 38th of the said constitutions and canons.

*27. 10. 68* To these articles the defendant made the following responsive allegations:—(a) As to the 3rd article, he admitted that he knelt during the prayer of consecration, but denied that he so knelt before the consecrated elements. He also admitted the acts of elevation alleged, but stated that he had discontinued them before the commencement of the suit. (b) To the 4th article he pleaded that the practices charged were not unlawful as alleged. (c) To the 5th article the defendant replied that “such charges are in part untruly pleaded, for the defendant alleges that on the said days the said lighted candles were not placed on the communion-table, but upon a narrow moveable ledge of wood resting on the said table, and that the said candles were so placed and kept lighted not only during the celebration of the holy communion, but also during the whole of the service, including the Epistle and Gospel, and during the singing after the reading of the Nicene Creed and during the sermon. (d) To the 6th article, a traverse of the illegality of the practices as alleged. (e) To the 7th article the defendant replied that before the commencement of the suit he had discontinued the practice of censuring persons and things. (f) To the 8th article, a traverse that the incense was unlawfully used, or that such use was unlawful. (g) To the 9th article a traverse. (h) To the 10th article, the defendant admitted the same to be true. (i) To the 11th article, a traverse.

The charges against Mr. Simpson, the defendant in the second case, with the exception that he was not charged with the unlawful use of incense, or with improper or excessive kneeling, were similar to those against Mr. Mackonochie. There were two additional



charges against him of minor importance, which are immaterial to this report. (1)

The causes were argued on the 4th, 5th, 6th, and 7th December, 1867; January 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th and 18th; February 5th, 6th, and 7th, 1868.

The questions raised, and the authorities referred to, are discussed seriatim in the judgment.

The counsel for Mr. Martin, the promoter in the first suit, were:—

*A. J. Stephens, Q.C., Coleridge, Q.C., Dr. Swabey, and Droop.*

For the defendant:—

*W. M. James, Q.C., Prideaux, Q.C., Dr. Tristram, and E. Charles.* (2)

The counsel for Mr. Flamank, the promoter in the second case, were:—

*A. J. Stephens, Q.C., Dr. Swabey, and Droop.*

For the defendant:—

*Dr. Deane, Q.C., Dr. Tristram, Hannen, and Arthur Charles.*

On the 28th of March, Sir ROBERT PHILLIMORE gave judgment:—

This case of *Martin v. Mackonochie* was brought before my predecessor in this chair, by letters of request from the Bishop of London, under the provisions of 3 & 4 Vict. c. 86. That statute, passed in the year 1840, enables any bishop within the province of Canterbury either to try the case of a clerk for a criminal offence before himself with certain assessors, or to send it to the court of the archbishop for trial in the first instance. Since the passing of this statute, bishops have very generally availed themselves of the latter provision, and this court has now before it several cases so sent from several suffragan dioceses of the province of Canterbury.

Under the old law, when these cases were triable in the consistorial court of each bishop, if they were sent by letters of request to the Court of Arches, these letters contained an averment that

(1) For the proceedings in *Flamank v. Simpson*, on the admission of the articles, see Law Rep. 1 A. & E. 276; and on appeal, Law Rep. 1 P. C. 463.

(2) Who died during the progress of the cause, 11th of December, 1867.

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the lack of counsel, and difficulty of obtaining proper legal assistance, rendered it expedient, for the ends of justice, that the case should be tried in the first instance in the Court of Appeal, that is, in this court. It is not to be wondered at, therefore, that this is, I believe, the only case but one which has been sent by letters of request from the great diocese of London, amply furnished as it is with all means and appliances requisite for the administration of justice, to the court of appeal; and I much regret that I am deprived of the great assistance which I should have derived from the judgment of the Bishop of London upon the important matters now before me, if the case had been brought to this court in the regular course of appeal.

The letters of request were accepted by Dr. Lushington, my learned predecessor in this chair, and in an early stage of these proceedings, before evidence had been taken or argument heard upon the merits of the case, I was counsel for the accused clerk, and took objections to the manner in which the offence was charged in the criminal articles. When the Archbishop of Canterbury was pleased to confer upon me the judgeship of his Grace's Court, I proposed to hear the case, with the assistance of two learned persons well skilled in ecclesiastical law, the Vicar-General of the Archbishop and the Chancellor of Rochester (to whom I take this opportunity of publicly expressing my thanks), but this arrangement was demurred to on behalf of the promoter of the Bishop of London's office, that is, the accuser; and I then appointed, as my patent gave me full power to do, those two learned persons to be my surrogates for the hearing of this cause. They held one court, and in consequence of arguments addressed to them touching the validity of their appointment, they adjourned the hearing of the cause until an opportunity had been afforded for an application to the temporal court for a prohibition. The counsel for Mr. Mackonochie applied to the Court of Queen's Bench for a rule nisi to shew cause why the prohibition should not go to these surrogates, upon the ground that I had exceeded my power in appointing them.

The promoter or accuser did not appear to shew cause against the prohibition, and the rule, upon an *ex parte* statement, was perhaps almost necessarily made absolute.

But I think if the rule had been opposed, and the powers given by my patent, and also the fact of the invariable usage of this court, as proved by its earliest records, to appoint surrogates, been duly brought to the attention of the Court of Queen's Bench, it would have refused the rule. I mention this circumstance in order to prevent any inconvenience which might ensue from its being supposed that this court had no power to appoint surrogates. After these proceedings in the Court of Queen's Bench, the surrogates whom I had appointed, by a formal instrument entered upon the records of this court, resigned the powers which I had conferred upon them.

I then proceeded to hear this cause, and the other, that of *Flamank v. Simpson*, brought before this court by letters of request from the Bishop of Exeter, in which almost the same questions were raised. The arguments in both cases have occupied the attention of the Court for sixteen days. The learning, ability, and industry of the counsel have greatly assisted the Court in the execution of the difficult task which it has to perform, namely, to give judgment upon the charges preferred against Mr. Mackonochie and Mr. Simpson.

A good deal has been said by the counsel on both sides respecting the motives of the accuser and the accused in this suit, but upon this subject the Court need say but very little.

Mr. Martin has been allowed by the Bishop of London to promote his lordship's office in this case, and I must, of course, presume that his lordship was satisfied upon good grounds, both that it was proper that his office should be promoted, and that Mr. Martin was a proper promoter; because his lordship, who has the advantage of having a very learned legal adviser, was, no doubt, aware from the decision of the Queen's Bench in *Reg. v. Bishop of Chichester* (1), as well as from the decision of the Privy Council in *Sherwood v. Ray* (2), that it was competent to him to exercise his discretion as to whether his office should be promoted or not. I must therefore consider Mr. Martin as having obtained full sanction for the course which he has adopted, and wholly decline to impute to him any unworthy motive whatever for the part which he has taken in this suit. It is, however, a matter of fact,

(1) 2 E. &amp; E. 209.

(2) 1 Moo. P. C. 353.

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admitted or proved before me, that Mr. Martin is not, legally speaking, a parishioner of St. Alban's, nor, of course, a churchwarden, a part of whose office it is to represent to the ordinary any misconduct on the part of the incumbent. This fact, however, if it should prove to be of any importance at all in this case, can only relate to the subordinate question of costs, and in no way affects my judgment upon the principal questions before me.

Upon the other hand, it is only fair to Mr. Mackonochie to state, that it appears from the documents in the cause, that, having the cure of souls in one of the worst and most neglected districts of London, and receiving moderate temporal emolument, he has devoted himself to the discharge of his holy office, and evangelizing an almost heathen population.

It is hardly necessary to say that he is not on this account entitled to conduct the services of the Church (if he has done so) in a manner not authorized by the law.

There are two modes of procedure in the ecclesiastical courts, one of a civil and the other of a criminal character. There have been, in recent times, two leading judgments delivered upon the lawfulness of certain ornaments (to which word a precise legal meaning has been attached) used during the celebration of divine worship, and certain decorations of churches.

In both these judgments, the questions for judicial decision were raised in the civil form of procedure.

The *Stone Altar Case* (1) (as it has been commonly called) arose on an application for a faculty in the Consistory of Ely, and was brought on appeal to this court.

The causes relating to the Knightsbridge churches (2) were instituted in a similar way in the Consistory of London, from the decision of which court an appeal was prosecuted, first to the Court of Arches, and ultimately to the Judicial Committee of the Privy Council, which last tribunal recommended her Majesty to reverse, upon many points, the decision of the courts below. As the archbishops and the bishops, who are privy councillors, are only members of the judicial committee in cases of criminal pro-

(1) *Faulkner v. Litchfield*, 1 Rob. Eccl. 184.

(2) 14 Moo. P. C. 1, and Moore's

separate report of the case. These cases are afterwards referred to as *Westerton v. Liddell*.



ceedings against clerks in holy orders, the prelates who did sit on this last occasion sat only as assessors and not as members of the court.

The proceedings taken in this case are of a criminal character, and the sound of them, so to speak, is harsher than that of those in the cases to which I have referred, but substantially the same end is sought, and the same remedy pursued; and, with an exception to be hereafter stated, I am not prepared to say,—inasmuch as not only certain ornaments, but also the use of them in the services of the Church, are complained of,—that it would have been competent to the promoters to have brought before me in a civil form all the matters contained in these criminal articles.

They are comprised under the following heads:—

(1.) The elevation of the blessed sacrament of the Lord's Supper, accompanied, in Mr. Mackonochie's case, by kneeling "or excessive kneeling" at times not prescribed by the rubrics.

(2.) The use of incense during the celebration of the eucharist.

(3.) The mixing of water with wine at the time of the administration of the Lord's Supper.

(4.) The use of lighted candles upon the holy table.

It will be necessary presently to enter into a fuller and more detailed statement of each of these charges, and of the answers to them. I will only observe that with one exception, to be noticed hereafter, there is no dispute in the case as to the facts to which the law is to be applied.

The law principally, though not exclusively, relied upon by the counsel for the promoter is contained in the Statutes of Uniformity. I must refer to these statutes.

The first statute is that of 2 & 3 Edw. 6, c. 1, which accompanied the first prayer-book. The second is that of 5 & 6 Edw. 6, c. 1, which accompanied the second prayer-book, and has been repealed. The third is that of 1 Eliz. c. 2, the penal sections of which are in force.

The additions made to the prayer-book by James I. were not accompanied by a separate statute, but were made under the powers conferred upon the Crown, acting with the metropolitans, under a clause of the Statute of Elizabeth.

Fourthly, the present Statute of Uniformity, the 13 & 14 Car. 2, c. 4, which embodies so much of the statutes of 2 & 3 Edw. 6, c. 1,

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and of 1 Eliz. c. 2, as were necessary for "the establishing and confirming" of the new prayer-book.

It is necessary to refer somewhat at length to the statutes now in force.

The 2 & 3 Edw. 6, c. 1, which is the first Act of Uniformity of Edward VI., begins by reciting that there had been in England "divers forms of common prayer; that is to say, the use of Sarum, of York, of Bangor, of Lincoln, and besides the same now of late, much more divers and sundry forms and fashions have been used in the cathedral and parish churches of England and Wales, as well concerning the matins or morning prayer and the evensong, as also concerning the holy communion, commonly called the Mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of the other sacraments of the Church; and as the doers and executors of the said rites and ceremonies in other form than of late years they have been used were pleased therewith, so others not using the same rites and ceremonies were thereby greatly offended: and albeit the King's Majesty, with the advice of his most entirely beloved uncle, the Lord Protector, with others of the council, hath heretofore divers times assayed to stay innovations or new rites concerning the premises, yet the same have not had such good success as his Highness required in that behalf: whereupon his Highness, by the most prudent advice, being pleased to bear with the frailty and weakness of his subjects in that behalf, of his great clemency hath not been only content to abstain from punishment of those that have offended in that behalf (for that his Highness taketh that they did it of a good zeal), but also to the intent that uniform quiet and godly order shall be had concerning the premises, appointed the Archbishop of Canterbury and certain of the most learned and discreet bishops and other learned men, to consider and ponder the premises, and thereupon, having as well eye and respect to the most sincere and pure Christian religion taught by the Scriptures as to usages in the primitive church, should draw and make one convenient and meet order, rite, and fashion of common and open prayer, and administration of the sacraments, to be had and used in his Majesty's realm of England and Wales, the which at this time, by the aid of the Holy Ghost, with one uniform agreement is of

them concluded, set forth, and delivered to his Highness, to his great comfort and quietness of mind, in a book entitled 'The Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the Church, after the use of the Church of England:' Wherefore the Lords spiritual and temporal, and the Commons, in this present parliament assembled, considering as well the most godly travel of the King's Highness, of the Lord Protector, and of other his Highness' council, in gathering and collecting the said archbishop, bishops, and learned men together, as the godly prayers, orders, rites, and ceremonies in the said book mentioned, and the considerations of altering those things which he altered, and retaining those things which he retained in the said book, but also to the honour of God, and the great quietness which by the grace of God shall ensue upon the one and uniform rite and order in such common prayer, and rites and external ceremonies, to be used throughout England and in Wales, at Calais, and the marches of the same, do give to his Highness most hearty and lowly thanks for the same." Then it goes on and says, "That all and singular ministers in any cathedral or parish church . . . shall be bounden to say and use matins, evensong, celebration of the Lord's Supper, commonly called the Mass, and administration of each of the sacraments and all their common and open prayer, in such order and form as is mentioned in this book, and none other or otherwise."

It then enacts, "That if any manner of parson, vicar, or other whatsoever minister that ought or should sing or say the common prayer mentioned in the said book, or minister the sacraments, shall . . . refuse to use the said common prayer or to minister the sacraments in such cathedral or parish church, in such order and form as they be mentioned and set forth in the said book, or shall use, wilfully and obstinately standing in the same, any other rite, ceremony, order, form, or manner of mass openly or privily, or matins, evensong, or other open prayer, than as mentioned and set forth in the said book," he then becomes liable to certain penalties.

The 7th section of this act states, "That it shall be lawful for all men, as well in churches, chapels, oratories, or other places, to use openly any psalms or prayer taken out of the Bible at any due

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time, not letting or omitting thereby the service or any part thereof mentioned in the said book."

The 8th section of this act provides, "That the books concerning the said services shall, at the costs and charges of the parishioners of every parish and cathedral church, be attained and gotten before the Feast of Pentecost next following, or before; and that all such parishes and cathedral churches, or other places where the said books shall be attained and gotten before the said Feast of Pentecost, shall, within three weeks next after the said books so attained and gotten, use the said service, and put the same in use according to this act."

The present Act of Uniformity, passed in the year 1662, the 13 & 14 Car. 2, c. 4, is entitled "An Act for the uniformity of public prayers, and administration of sacraments, and other rites and ceremonies; and for establishing the form of making, ordaining, and consecrating bishops, priests, and deacons in the Church of England."

The 1st section gives the following title to our present prayer-book:—"The Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the Church, according to the use of the Church of England; together with the psalter or psalms of David, pointed as they are to be sung or said in churches; and the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons."

The 2nd section, after reciting "that nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than a universal agreement in the worship of Almighty God, and to the intent that every person in this realm may certainly know the rule to which he is to conform in public worship and administration of sacraments, and other rites and ceremonies of the Church of England," enacts, That all ministers "shall be bound to say and use the morning prayer, evening prayer, and celebration and administration of both sacraments, and all other the public and common prayer, in such order and form as is mentioned in the book annexed and joined to the present act, intituled the Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the Church, according to the Church of England."



By the 17th section it is further enacted, "by the authority aforesaid, that no form or order of common prayers, administration of sacraments, rites, or ceremonies, shall be openly used in any church, chapel, or other public place, or in any college or hall in either of the universities, the colleges of Westminster, Winchester, or Eton, or any of them, other than what is prescribed and appointed to be used in and by the said book."

And by the 24th section it is further enacted, "by the authority aforesaid, that the several good laws and statutes of this realm, which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments within this realm of England and places aforesaid, shall stand in full force and strength, to all intents and purposes whatsoever, for the establishing and confirming of the said book" (intituled as aforesaid) "hereinbefore mentioned to be joined and annexed to this act, and shall be applied, practised, and put in use for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other."

By the statute 1 Eliz. c. 2, s. 27, it is enacted, "that all laws, statutes, and ordinances wherein or whereby any other service, administration of sacraments, or common prayer is limited, established, or set forth to be used within this realm, or any other the Queen's dominions or countries, shall from henceforth be utterly void and of none effect."

The main proposition upon which the alleged unlawfulness of all the matters contained in the criminal articles has been rested by the counsel for the promoter is, that they are all, in effect, rites and ceremonies other than and additional to those which are prescribed in the prayer-book and the Act of Uniformity.

The answer to this charge is twofold: first, it is averred that the matters complained of are not rites or ceremonies: secondly, that if they fall within either category they are not "other than or additional to" those prescribed in the Book of Common Prayer, in the sense of being at variance with or repugnant to them, forasmuch as they are in accordance with and subsidiary to them.

Under the first position they maintain that the terms "rites and ceremonies" mean an entire service, such as masses for the

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dead, or services for particular festivals; or customs, such as creeping to the cross, and the like, which were abolished at the time of the Reformation.

That the elevation of the blessed sacrament, excessive kneeling, the use of incense, the mixing water with the wine, the lighting of candles, are elements or ingredients of a rite or ceremony, and not a rite or a ceremony per se.

The terms rite and ceremony, as used in the first prayer-book, and from thence imported into our present prayer-book, are terms, so to speak, of ecclesiastical and ritual art, and must be construed with reference to their use in contemporaneous and other works of writers upon ritual, unless they receive a different meaning from a comparison of other passages or parts in the prayer-book or statute in which they are found.

I must, therefore, refer at length to the preface in our prayer-book, entitled,—

“Of ceremonies: why some be abolished and some retained.

“Of such ceremonies as be used in the Church, and have had their beginning by the institution of man, some at the first were of godly intent and purpose devised, and yet at length turned to vanity and superstition; some entered into the Church by indiscreet devotion, and such a zeal as was without knowledge; and for because they were winked at in the beginning, they grew daily to more and more abuses, which not only for their unprofitableness, but also because they have much blinded the people, and obscured the glory of God, are worthy to be cut away, and clean rejected: other there be, which although they have been devised by man, yet it is thought good to reserve them still, as well for a decent order in the Church (for the which they were first devised), as because they pertain to edification, whereunto all things done in the Church (as the apostle teacheth) ought to be referred.

“And although the keeping or omitting of a ceremony, in itself considered, is but a small thing; yet the wilful and contemptuous transgression and breaking of a common order and discipline is no small offence before God. *Let all things be done among you, saith Saint Paul, in a seemly and due order:* the appointment of the which order pertaineth not to private men; therefore no man ought to take in hand, nor presume to appoint

or alter any public or common order in Christ's church, except he be lawfully called and authorized thereunto.

"And whereas in this our time, the minds of men are so divers, that some think it a great matter of conscience to depart from a piece of the least of their ceremonies, they be so addicted to their old customs; and again on the other side, some be so new-fangled, that they would innovate all things, and so despise the old, that nothing can like them, but that is new; it was thought expedient, not so much to have respect how to please and satisfy either of these parties, as how to please God, and profit them both. And yet lest any man should be offended, whom good reason might satisfy, here be certain causes rendered, why some of the accustomed ceremonies be put away, and some retained and kept still.

"Some are put away, because the great excess and multitude of them hath so increased in these latter days, that the burden of them was intolerable; whereof Saint Augustine in his time complained, that they were grown to such a number, that the estate of Christian people was in worse case concerning that matter than were the Jews. And he counselled that such yoke and burden should be taken away, as time would serve quietly to do it. But what would Saint Augustine have said, if he had seen the ceremonies of late days used among us; whereunto the multitude used in his time was not to be compared? This our excessive multitude of ceremonies was so great, and many of them so dark, that they did more confound and darken, than declare and set forth Christ's benefits unto us. And besides this, Christ's Gospel is not a ceremonial law (as much of Moses's law was), but it is a religion to serve God, not in bondage of the figure or shadow, but in the freedom of the spirit; being content only with those ceremonies which do serve to a decent order and godly discipline, and such as be apt to stir up the dull mind of man to the remembrance of his duty to God, by some notable and special signification, whereby he might be edified. Furthermore, the most weighty cause of the abolishment of certain ceremonies was, that they were so far abused, partly by the superstitious blindness of the rude and unlearned, and partly by the unsatiable avarice of such as sought more their own lucre than the glory of God, that the abuses could not well be taken away, the thing remaining still.

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“But now as concerning those persons, which peradventure will be offended, for that some of the old ceremonies are retained still. If they consider that without some ceremonies it is not possible to keep any order, or quiet discipline in the Church, they shall easily perceive just cause to reform their judgments. And if they think much, that any of the old do remain, and would rather have all devised anew: then such men granting some ceremonies convenient to be had, surely where the old may be well used, there they cannot reasonably reprove the old only for their age, without bewraying of their own folly. For in such a case they ought rather to have reverence unto them for their antiquity, if they will declare themselves to be more studious of unity and concord than of innovations and new fangleness, which (as much as may be with true setting forth of Christ's religion) is always to be eschewed. Furthermore, such shall have no just cause with the ceremonies reserved to be offended. For as those be taken away which were most abused, and did burden men's consciences without any cause: so the other that remain, are retained for a discipline and order which (upon just causes) may be altered and changed, and therefore are not to be esteemed equal with God's law. And moreover they be neither dark nor dumb ceremonies, but are so set forth, that every man may understand what they do mean, and to what use they do serve. So that it is not like that they in time to come should be abused as other have been. And in these our doings we condemn no other nations, nor prescribe anything but to our own people only: for we think it convenient that every country should use such ceremonies as they shall think best to the setting forth of God's honour and glory, and to the reducing of the people to a most perfect and godly living, without error or superstition; and that they should put away other things, which from time to time they perceive to be most abused, as in men's ordinances it often chanceth diversely in divers countries.”

Perhaps it would be difficult to deduce from this language any certain conclusion as to the precise sense in which the terms rites and ceremonies are used.

In the first prayer-book, at the close of the dissertation, which is at the end of the services, “Of ceremonies, why some be abolished and some retained,” are “certain notes for the more explication-



and decent ministration of things contained in this book," one "note" is "as touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left as every man's devotion serveth without blame."

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This note does not appear in the subsequent prayer-books, but, nevertheless, at the Hampton Court conference in the year 1603, the Bishop of Winchester, replying to the objections made by the Puritans to the use of the cross in baptism and ceremonies generally, said :—

"Thirdly, in prayer, the kneeling on the ground, the lifting up of our hands, the knocking of our breasts, are ceremonies significant; the first, of our humility coming before the mighty God; the second, of our confidence and hope; the other, of our sorrow and detestation of our sins; and these are and may lawfully be used. M. Dean of the Chapel remembred the practice of the Jews, who, unto the institution of the Passeeover, prescribed unto them by Moses, had, as the rabbins witnesse, added both signes and words, eating soure herbs, and drinking wine, with these words to both, 'Take, and eat these in remembrance,' &c.; 'Drink this in remembrance,' &c. Upon which addition and tradition of theirs, our Saviour instituted the sacrament of his last supper, in celebrating it with the same words and after the same manner; thereby approving that fact of theirs in particular, and generally, that a church may institute and retain a signe significant:" which, says the reporter of the conference, satisfied his Majesty exceeding well. (1)

These gestures appear to me to have been considered as ceremonies wisely left to every man's discretion.

In the first "order of the communion" which preceded the first prayer-book the rubric says, "The time of the communion shall be immediately after that the priest himself hath received the sacrament, without the varying of any other *rite* or *ceremony* in the mass (until other order shall be provided), but, as heretofore, usually the priest has done with the sacrament of the body," &c.

Here, again, rite and ceremony seem to be used for elements or portions of a service.

Let us consider the construction put upon the Latin terms (from

(1) Cardwell, *Conferences on the Book of Common Prayer*, 3rd ed. p. 197.

186S which, of course, the English terms are borrowed) *ritus et cære-*  
 MARTIN *moniæ* by high Latin authorities.  
 v. Bona (*Opera Omnia*, p. 562), writing, *De Disciplina psallendi*,  
 MACKONCHIE. § 3, says:—  
 FLAMANK *Cæremoniæ quid sint, et quæ hujus nominis origo. Earum*  
 v. *efficacia, et utilitas ad divinum cultum. Veræ a falsis, et super-*  
 SIMPSON. *stitiosis discernendæ. Exteriores ceremonias sine interno spiritu*  
*parum prodesse.*

. . . Sunt autem cæremoniæ, si propriè loqui velimus, ritus sancti in sacrificiis, et divinis officiis ad Dei cultum adhibiti: sed migravit vocabulum in usus etiam profanos; nam cum homines instituissent sibi invicem inclinare, genua flectere, manus osculari: hæ et aliæ honoris exhibitiones, cum proprio nomine carerent, cœptæ sunt etiam cæremoniæ dici.

Van Espen (*Jus Eccles. Universum*, tom. I. p. 410, pars. 2. tit. v., cap. 1, sect. ix. *de celebratione Missarum*) speaking of the celebration of the eucharist, says: "certum tamen est ipsum apostolis suis, totique Ecclesiæ, in eorum personâ, potestatem, auctoritatemque dedisse, ea omnia in augustissimi hujus mysterii *ritibus* seu *cæremoniis* addendi, demendi, immutandi, quæ illius dignitati et populorum devotioni pro temporum et locorum diversitate, magis congruere judicarent."

Here, *ritus* and *cæremoniæ* are not separate services, but certain ingredients or accompaniments of one service, that of the eucharist.

Gavanto (vol. 1, p. 3, ed. 1823, Venice), a great Roman ritualist, says that Bona and Suarez both define *cæremonia* as "actio religiosa ad cultum et decentiam sacrificii ab ecclesiâ instituta."

He quotes Quarti's opinion as follows:—

"Procedit Quarti ad dividendas cæremonias in eas, quæ sunt intrinsecæ ipsi missæ, et partes ejusdem, et consistunt, dicit ipse, tum in verbis, tum in gestibus celebrantis, de quibus late Suarez, *disp.* 83 et 84, et in eas, quæ sunt circumstantiæ extrinsecæ ejusdem sacrificii, ut locus, tempus, vasa, et vestimenta sacra, &c. Dicit præterea, quod illæ cæremoniæ, quæ consistunt in gestibus, quædam inductæ sunt propter decentiam operandi, nec habent aliam significationem, ex. gr. quod sacerdos dum signat seipsum ponit sinistram sub pectore: et aliæ inductæ sunt propter significationem moralem, vel mysticam, verb. grat. *mixtio aquæ cum vino*," (observe

these words,) "digitorum ablutio, crucis signa, de quibus Divus Thomas 3 *part quæst.* 83, *artic.* 4, § 5.

"Verum, pace tanti viri, ego distinguerem cæremoniam sacram a ritu, dicendo, ritus sacros consistere in illis precibus, epistola, evangelio, &c., quæ juxta ecclesiæ dispositionem recitari debent in missâ; cæremoniam autem consistere in solis gestibus, quibus prædictæ preces juxta ejusdem ecclesiæ præscriptum peragi debent ad majorem ornatum, et decentiam sacrificii, quod celebratur; et revera Cæremonialia, seu libros cæremoniarum vocamus illos, qui non orationes et preces dicendas præscribunt, sed modum quo illæ dicendæ sunt; e contra Rituales nuncupamus illos, qui continent preces, seu alias orationes, quas recitandas præscribunt.

"Ritus, quoniam in verbis regulariter consistunt, vel sunt partes missæ ordinariæ, quia scilicet semper ingrediuntur ejus compositionem; vel sunt extraordinariæ, sive mobiles, quia non semper ejus compositionem ingrediuntur, sed ad majorem quandoque adduntur solemnitatem, atque ornatum." (1)

The Council of Trent, in the 22nd session, the 5th chapter (2), "*De Missæ Ceremoniis et Ritibus*," speaks as follows:

"Cumque natura hominum ea sit, ut non facile queat sine adminiculis exterioribus ad rerum divinarum meditationem sustolli propterea pia mater ecclesia ritus quosdam, ut scilicet quædam submissa voce, alia vero elatiore, in missâ pronunciarentur, instituit. Ceremonias, item adhibuit, ut" (these are the instances of ceremonies) "mysticas benedictiones, *lumina*, *thymiamata*, vestes, aliaque id genus multa, ex apostolicâ disciplinâ et traditione: quo et majestas tanti sacrificii commendaretur, et mentes fidelium per hæc visibilia religionis et pietatis signa ad rerum altissimarum, quæ in hoc sacrificio latent, contemplationem excitarentur."

Whatever authority this passage may have, it would appear to include under the title *Cæremoniæ*, among other things, the use of lights, of incense, and of vestments.

There is no doubt that the terms rites and ceremonies are sometimes used in the sense contended for by the defendants; but on the whole, the result of this examination of authorities leads me to the conclusion that there is a legal distinction between a rite

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(1) Gavanto, Thesaurus Sacrorum bricâ Generali.

Rituum, vol. i., p. 4. Pars. I. in Ru-

(2) Edit. Coleti, tom. 20, p. 130.

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and a ceremony; the former consisting in services expressed in words, the latter in gestures or acts preceding, accompanying, or following the utterance of these words.

Applying this principle to the charges before me, I am of opinion, that the matters complained of must be considered in law as ceremonies.

Before I proceed to consider the greater question, whether they are ceremonies forbidden by the ecclesiastical law of England, and more especially by that part of it which consists of the provisions of the prayer-book and the Statute of Uniformity, I think it right to draw attention to the judgment of the Church universal, and especially of "that pure and apostolical branch of it established in this realm," upon the general subject of ceremonies.

And from that judgment it will, I think, appear that an essential distinction is drawn between those which are from their origin immutable, and those which it is competent to the proper authorities to mould according to the varying necessities and exigences of each particular church.

The only orders given in the New Testament with respect to the ritual of the Church are of the most general kind, and are to be found in the following passages: Saint Paul in his first epistle to the Corinthians directs, "*πάντα πρὸς οἰκοδομὴν γενέσθω*," and again, "*πάντα εὐσχημόνως καὶ κατὰ τάξιν γενέσθω*," which we render, "Let all things be done for edification," and "Let all things be done decently and in order."

Saint Augustine, whose authority our Church so highly regards, observes (Ep. 36, tom. ii. p. 101), "In his rebus de quibus nihil certi statuit Scriptura Divina, mos populi Dei vel instituta majorum pro lege tenenda sunt."

And St. Jerome, to whom our articles refer, says (Ep. xxviii. ad Lucinium Bæticum), "Ego illud te breviter admonendum puto traditiones ecclesiasticas præsertim" (remark the caution) "quæ fidei non officiant ita observandas ut a majoribus traditæ sunt: nec aliorum consuetudinem aliorum contrario more subverti. Sed unaquæque provincia abundet in suo sensu, et præcepta majorum leges apostolicos arbitretur."

When Augustine, the missionary of Gregory the Great (to whom this country is so much indebted), found the ancient British

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churches in possession of a ritual in accordance with the Gallican use and that of the Eastern church, he became perplexed what course to pursue, and wrote for advice on the subject to the Pope. From our old historian Bede we learn how wise an answer he received:

(Beda, Hist. i. 27, § 60, Secunda interrogatio Augustini.) (1) "Cum una sit fides," wrote Augustine, "sunt ecclesiarum diversæ consuetudines, et altera consuetudo missarum in sanctâ Romanâ ecclesiâ, atque altera in Galliarum tenetur? Respondit Gregorius Papa. Novit fraternitas tua Romanæ ecclesiæ consuetudinem, in qua se meminit nutritam. Sed mihi placet, sive in Romanâ, sive in Galliarum, siu in qualibet ecclesiâ, aliquid invenisti quod plus Omnipotenti Deo possit placere, sollicitè eligas, et in Anglorum ecclesiâ, quæ adhuc ad fidem nova est, institutione præcipua, quæ de multis ecclesiis colligere potuisti, infundas. Non enim pro locis res, sed pro bonis rebus loca amanda sunt. Ex singulis ergo quibusque ecclesiis, quæ pia, quæ religiosa, quæ recta sunt elige, et hæc, quasi in fasciculum collecta, apud Anglorum mentes in consuetudinem depone."

According to a later historian of our church, the learned Field, Dean of Gloucester, "Ceremonies are outward acts of religion, having institution, either from the instinct of nature, as the lifting up of the hands and eyes to heaven, the bowing of the knee, the striking of the breast, and such like; or immediately from God, as the sacraments; or from the Church's prescription: and either only serve to express such spiritual and heavenly affections, dispositions, motions, and desires as are or should be in men; or else to signify, assure, and convey unto them such benefits of saving grace as God in Christ is pleased to bestow on them. To the former purpose and end the Church hath power to ordain ceremonies; to the latter, God only." (2)

And Burnet, in his History of the Reformation (Ed. Pocock, vol. ii., p. 155), expressing himself with greater accuracy than usual, in speaking of the use of a ceremony in relation to the belief of the Church, says, "This seems more necessary to be well explained, by reason of the scruples that many have since raised against significant ceremonies, as if it were too great a presump-

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(1) Edit. Stevenson, p. 59.

(2) Field, of the Church, vol. ii. p. 527.

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tion in any church to appoint such, since these seem to be of the nature of sacraments. Ceremonies that signify the conveyance of a Divine grace and virtue are indeed sacraments, and ought not to be used without an express institution in Scripture; but ceremonies that only signify the sense we have, which is sometimes expressed as significantly in dumb shows as in words, are of another kind; and it is as much within the power of the Church to appoint such to be used, as it is to order collects and prayers, words and signs being but different ways of expressing our thoughts.

The language of our Church in her Articles on this subject is expressed as follows: In Article XX. :—

“Of the Authority of the Church.

“The Church hath power to decree rites and ceremonies, and authority in controversies of faith: And yet it is not lawful for the Church to ordain anything that is contrary to God’s Word written, neither may it so expound one place of Scripture, that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of Holy Writ, yet, as it ought not to decree anything against the same, so besides the same ought it not to enforce anything to be believed for necessity of salvation.”

And in the XXXIVth Article :—

“Of the Traditions of the Church.

It is not necessary that traditions and ceremonies be in all places one, or utterly alike, for at all times they have been divers, and may be changed according to the diversities of countries, times, and men’s manners, so that nothing be ordained against God’s Word. Whosoever, through his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked openly (that others may fear to do the like), as he that offendeth against the common order of the Church, and hurteth the authority of the magistrate, and woundeth the consciences of the weak brethren.”

“Every particular or national Church hath authority to ordain change, and abolish ceremonies or rites of the Church ordained only by man’s authority, so that all things be done to edifying.”

Bishop Beveridge (few higher authorities could be invoked) in

his “*Ecclesia Anglicana Ecclesia Catholica*, or the Doctrine of the Church of England consonant to Scripture, Reason, and Fathers, in a Discourse upon the Thirty-nine Articles” (1), thus comments upon Article XX., “Of the Authority of the Church:”—

“First (he says), it hath power to decree rites and ceremonies, so that it is lawful for the Church to decree and appoint what rites or ceremonies shall be used in the public worship of the great God; not as parts of that worship, for then they would not be rites and ceremonies. And therefore it is in vain objected by the adversaries to this truth, that herein we give the Church power to add anything to God’s worship which is not commanded in his Word, as if rites and ceremonies were in themselves any part of worship; whereas, what is any part of God’s worship cannot be a mere rite or ceremony, neither can that which is a mere rite or ceremony be any part of his worship. For rites and ceremonies, in that they are nothing but rites and ceremonies, be in themselves indifferent, neither good nor bad, until determined by the Church; after which determination also they still remain indifferent in themselves, and are good and bad only in reference to their decree, who had power and authority to determine them; whereas every the least part of God’s worship can be by no means omitted without sin. And therefore when it is here said that the Church hath power to decree rites and ceremonies, we must always by the words rites and ceremonies understand nothing else but the particular circumstances and customs to be observed in the service and worship of God, not as any cause or part thereof.”

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Again, the Bishop says:—

“We must needs grant that the Church of Corinth (and so other churches) had power and authority to determine and order these things. Or, if they had no such power before, yet St. Paul, or rather the Most High God by St. Paul, did in these words grant them such a power and authority, in the decreeing these and the like circumstances and ceremonies for the more decent and orderly worshipping of the Glorious Jehovah, giving them this one general comprehensive rule, ‘Let all things be done to edifying, and in order;’ out of which one general rule, that, and all churches

(1) Beveridge’s Works, Oxford, 1845, vol. vii. p. 373.

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whatsoever, according to the variety of times and places they live in, were to frame other particular rules and canons for the edifying and orderly performance of God's worship; who being a God, not of confusion, but of order in himself, he requires such worship as is done in order, not in confusion, from us." (1)

“Neither can I see in reason how this power in ceremonies and controversies should be denied the Church. For first, as for ceremonies, they cannot but be acknowledged to be indifferent, neither in themselves good nor bad; and if they be in themselves either good or bad, and not indifferent, they are not merely ceremonies, especially if they be in their own nature bad and sinful, they are not the ceremonies intended in this place. For this same article, in the following part of it, doth determine that the ceremonies here intended are only such as are not against the Scripture, and by consequence not unlawful. Now such rites and ceremonies as are in themselves indifferent, it can be no sin to determine them to either part; for which part soever they are determined to, they cannot be determined into sin; I mean, what is in itself indifferent, and so may be used or not used without sin, whether it be decreed to be used, or not to be used, it cannot be any sinful decree, especially when, after as well as before the decree, they are still acknowledged to be in themselves indifferent, though not as to our use. Which things of indifferency, also, as all ceremonies are, cannot be supposed to come within the command of God, for then they would not be indifferent; and seeing God hath not left any particular command, but only a general rule about all things of indifferency, that they be so ordered that they be done decently and to edifying, the Church cannot be thought to sin in determining them, so as she thinks the most edifying and decent, as we shall by the blessing of God see more fully in the Thirty-fourth Article. And if it be no sin thus for the Church to determine ceremonies, it must needs be granted that she hath power to decree them.” (2)

And on Article XXXIV., “Of the Traditions of the Church,” the Bishop observes:—

“But there being many circumstances required to the perform-

(1) Beveridge's Works, Oxford, 1845, vol. vii. p. 375.

(2) Ibid. p. 377.



ance as well of religious as civil actions, and so to the worship of God as well as anything else, as, for example, the time when, the place where, the habit in which his public service shall be performed, and the like, it being impossible it should be performed without these and the like circumstances, and seeing the all-wise God hath thought good not to determine these in his Word, but to leave it to the discretion of the Church to determine them as it shall see fit, only giving them this general rule to square all these their determinations by—‘Let all things be done decently and in order;’ hence it is that every particular church hath still thought fit to exercise this her power and authority in determining these circumstances, according to that manner as seemeth to herself orderly and devout; so that there is no necessity that one church should determine them after the same manner that another doth; nay, it is often necessary that one church should not follow another in this case; for it often so falls out that what is decent in one place is unseemly in another, and every church is bound to model circumstances according to that order which is the most seemly and decent in the place where it is settled.” (1)

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“And if we should descend down to after councils, we shall find there was scarce ever a provincial church met together in council since our Saviour’s time but did not ordain some ceremonies or other to be observed by her children. It would be an endless thing to reckon up all the ceremonies that were ordained or ordered by provincial churches; or, indeed, all the provincial churches that ordained or altered ceremonies in the primitive times. I shall therefore instance only in such ceremonies as our church hath thought good still to retain, that so we may see both how provincial churches have still looked upon themselves in all ages to have power to ordain ceremonies, and also, that the ceremonies retained and ordered by our church are no new-fangled ceremonies, nor Popish superstitions, but that most of them were ordained and used in the primitive church before the Pope had forged his superstitions.” (2)

This very learned prelate then recites a great number of instances in which the provincial councils of different countries

(1) Beveridge’s Works, Oxford, 1845, vol. vii. p. 526.

(2) Ibid. p. 536.

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have made ordinances with respect to their own ritual observances, and adds (1), "And thus we see how many, even of the very rites and ceremonies which are still in use amongst us, were long ago ordained by provincial churches met together in council; many more might I heap up to the same purpose, but these may be enough to shew how the provincial or national churches of Christ, in all ages, since his incarnation, have still exercised this power in ordaining, altering, and abolishing ceremonies, which certainly they would never have done if they had not believed they had power to do it."

Bishop Jeremy Taylor (2), in his "Rule of Conscience," lays down as rule 12, *All those rituals which were taught to the Church by the apostles concerning ministries, which were of Divine institution, do oblige all Christendom to their observation.*

And on this rule he observes:—

" (1.) I instance in the holy sacrament first of all; concerning which the apostles delivered to the churches the essential manner of celebration, that is, the way of doing it according to Christ's commandment, for the words themselves, being large and indefinite, were spoken indeed only to the apostles, but yet they were representatives of all the whole ecclesiastical order in some things, and of the whole Christian church in others; and, therefore, what parts of duty and power and office did belong to each, the apostles must teach the church, or she could have no way of knowing without particular revelation.

" (2.) Thus the apostles taught the bishops and priests to consecrate the symbols of bread and wine before they did communicate; not only because by Christ's example we were taught to give thanks before we eat, but because the apostles knew that the symbols were consecrated to a mystery. And that was done from the beginning, and in all churches, and in all ages of the Church; by which we can conclude firmly in this rule, that the apostles did give a canon or rule to the churches to be observed always, and that the Church did never believe she had authority or reason to recede from it. For in those rights which are ministries of grace, no man must interpose any thing that can alter any part of the institution, or

(1) Beveridge's Works, Oxford, 1845,  
 vol. vii, p. 540.

(2) Heber's edition, 1852, vol. x.  
 pp. 335, 336.

make a change or variety in that which is of Divine appointment. For the effect in these things depends wholly upon the will of God, and we have nothing to discourse or argue; for we know nothing but the institution, nothing of the reason of the thing, and therefore we must in these cases, with simplicity and obedience, apply ourselves to practise as we have received, for we have nothing else to guide us: memory and obedience, not discourse and argument, are here in season."

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The bishop then proceeds to distinguish between alterable and unalterable rites, as follows (1):—

"But where the apostles did not interpose, there the churches have their liberty; and in those things also which evidently were no part of the appointed liturgy or ministration, in those things, though it be certain the apostles did give rules of order and decency, yet because order is as variable as the tactics of an army, and decency is a relative term and hath a transient and changeable sense, in all these things there is no prescription to the Church, though we did know what the churches apostolical did practise, for they did it with liberty, and, therefore, we are not bound; the churches are as free as ever; though the single persons in the churches can be bound, yet the churches always have liberty." (2)

(1) Heber's edition, 1852, vol. x. p. 336.

(2) The bishop continues thus:—(p. 406):—"This rule is to be understood positively and affirmatively, that is, the Church in all her constitutions must take care that the Church be edified and built up in some grace or other; but not so, that whatsoever is for edification, she hath power to command. The measures and limits of her legislative power I have already described; it must be within those circles: and though other things without them may be useful and fit for instruction, or to promote the interest of a virtue, yet Christ hath left them at liberty, and his church hath no power to bind beyond his commission. They can ex-

hort and persuade, and, by consent, they can prescribe, but to the making of a law there is something else required besides that it be apt to edify or to instruct. For (besides that it must be of something placed in her power) it must edify, and not destroy; it must build up, and not pull down; that is, it must build with all hands, and not pull down with one.

"I instance in the institution of significant ceremonies, that is, such which are not matters of order or decency, but merely for signification and the representation of some truth or mystery. Those which are prudently chosen are in their own nature apt to instruct. Thus, the use of pictures in the Greek and in the Lutheran Churches is so far

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Luther, in the "Formula Missæ et Communionis" for the Church of Wittenberg, which appears to have been written in 1523, speaking of the ceremonies of Divine worship which he recommends, says:—

"Sexto, requiritur Evangelii lectio. Ubi nec candelas neque thurificationem prohibemus, sed nec exigimus, esto hoc liberum." (1)

The same spirit of true liberality is exemplified in the writings of the late most distinguished American prelate, the Bishop of Vermont. Speaking of ornaments used in the services of the Church, he observes:—

"The same liberty exists with regard to lights upon or behind the altar, the use of chrism and incense, the mixing of water with the wine of the holy eucharist, and the representation of figures and emblems in stained glass windows; for all of these were established by usage in the second year of Edward VI., and our Church has uttered no *prohibition* concerning any of them, but has merely *omitted* to notice them, directly or indirectly, in her whole legislation. It is certain that none of these things interfere with our liturgy, because they may be used without deviating in the slightest degree from our prescribed forms.

"And the plain result would seem to be, that their introduction, whether expedient or not, can never be justly considered unlawful." (2)

useful, that it can convey a story, and a great and a good example to the people that come thither, and so far they may be for edification. But because these can also, and do too often degenerate into abuse, and invade religion, to make a law of these is not safe; and when that law does prevail to any evil that is not easily by any other means cured, it does not prevail upon the conscience, and, indeed, to make a law for the use of them, is not directly within the commission of the ecclesiastical power."

(1) The note of the learned editor, Daniel, in his edition of the Codex Liturgicus (Leipsic, 1848), on this is:—"Sunt quibus thuris odor tam lucu-

lentum sit documentum Romanismi, ut si navibus ducant bonos odores thymiatum, statim clament, se odorari ecclesiam Romano-Catholicam. Vident thuris oblationem Lutheri esse ἀδιόφορον. Hoc tamen certum est, thurificationis vestigia in ecclesia Lutheri exstare vestigia fere nulla (cf. p. 24). In hac urbe nostrâ Halensi sæpius vidi in ecclesiis tribus majoribus, si summæ celebrabantur festivitates, pueros, cum acerris fumigantibus ecclesiæ navim percurrentes: sed hæc cærimonia magis ad εὐωδίαῦν quandam respicere videtur, quam ad cultum divinum."

(2) Law of Ritualism, by the Bishop of Vermont, p. 84.



Great variety of usage is to be found in the Greek, the Roman, the Gallican, and the English churches upon this subject. All persons moderately acquainted with ecclesiastical history are aware with what zeal and tenacity the church of Milan (1) has clung to its Ambrosian rite :—of the various liturgies of the Greek church, and the different uses in England which, though much reconciled by the famous use of Sarum, were ultimately merged in our present prayer-book.

I will close my citations on this subject with one from the great Roman ritualist, Bona :—

“Quarto tanquam verissimum, et apud omnes indubitatum habendum est id quod sæpius in hoc libro repetendum fuit, quædam esse in ecclesia, quæ ad fidem ut dogmata, quædam quæ ad ritus ut mores pertinent. Quæ fidei sunt, sancta inviolabilia, immutabilia semper, et ubique manent; Deumque solum auctorem agnoscunt. Ad ea credenda cæco quodam obsequio captivum ducimus intellectum; ut si quis ea turbare, vel quovis modo immutare aut iis contradicere ausus fuerit, diro anathemate percussus extra ecclesiam fit, nec locum deinceps habet inter Orthodoxos. Ritus et ea quæ morum, ac disciplinæ sunt ab hominum arbitrio pendent, et cum tempore variantur, rerumque statu immutato veteres consuetudines abrogantur, et novæ succedunt, illæsa fidei unitate.” (2)

“Moribus autem immutatis sacros quoque ritus variari consequens fuit.”

“Distinguendæ igitur ætates disquirenda mutationis ratio et

(1) The writer, speaking of the reforms of the Roman liturgy about the time of, and after the Council of Trent, ascribes the preservation of the use of Milan to the energy of the great Archbishop San Carlo Borromeo :—“Or dirò di quanto ha fatto S. Carlo per la difesa e per la ristorazione dei riti e delle ceremonie Ambrosiane. Se un uomo di debole tempra avesse a quei tempi tenuta la seda Arcivescovile e di Milano, l'antichissima nostra liturgia, espressione e conservazione di più riti primitivi, era forse per subire quelle sorti,

che toccarono, già son più secoli, alla gallicana poi alla mozarabica . . . Ora non è più a temersi alcun pericolo per la continuità del rito Ambrosiano immobilmente stabilito sul possesso e sulla pratica di presso a diciotto secoli, e tenuto in conto di caro e prezioso deposito che i presenti han ricevuto dai maggiori e devono tramandare ai posteri intatto ed illibato.”—(Esposizione delle Ceremonie della Messa Privata giusta il Rito Ambrosiano, p. 18 e 20.)

(2) Bona, *Opera Omnia*, “*Rerum Liturgicarum*,” Lib. i., c. xxiii., p. 265.

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FLAMANK possunt ac mutari sine fidei ac unitatis dispendio. (2)

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SIMPSON. I have thought it expedient to recite the foregoing authorities

3Q-8112 upon the nature of rites and ceremonies in order to fortify my position, that the questions now pending before me in no way affect the relations of the Church of England to the Church Catholic, but have reference solely to matters of detail and order in her ministrations, which every independent church has at all times claimed and exercised; and having thus, I trust, divested the issue of the case before me of that importance which has been, not unnaturally, perhaps, ascribed to it by the excited feelings of both parties, I return to the consideration of the charges contained in these criminal articles.

I am not called upon to pronounce in the judgment which I am about to deliver any decision upon any question of doctrine. If, indeed, the law had cast so grave a responsibility upon me, I should have much considered whether it would not have been right and proper to have invoked the aid of spiritual assessors, competent from their position and learning in the Church, to have assisted and guided me in the discharge of such a duty. I thank God, however, that no such consideration embarrasses me on the present occasion.

Criminal  
Articles in the  
Ecclesiastical  
Court, distinguished  
from an  
Indictment.

Two conclusions result from the premises which I have stated: first, that the matters in dispute are ceremonies; and secondly, that they belong to that category of ceremonies which are designated "mutable."

There is also a proposition of fact which should be mentioned in this place, that none of the ceremonies complained of are expressly directed to be used either in the prayer-book or the Act of Uniformity.

The promoter avers, and undertakes to prove, that with respect to these matters of charge, Mr. Mackonochie has violated the Statutes of Uniformity, certain specified canons of those enacted by the Convocation and Crown in 1603, and the general ecclesiastical law.

(1) Bona, Opera Omnia, "Rerum p. 242.  
Liturgicarum," Lib. i. c. xviii, s. 1, (2) Ibid., s. ix., p. 247.

The counsel for Mr. Mackonochie have contended, that inasmuch as a breach of the Statutes of Uniformity rendered Mr. Mackonochie liable to be proceeded against criminally in a court of common law, as well as in this court, I am bound to apply the same rules and observe the same strictness required by the common law courts in a matter of indictment. I am of a different opinion, having regard both to principle and to precedent; nor do I admit the proposition that unless Mr. Mackonochie be proved to have committed a breach of the Statutes of Uniformity, although he should be proved to have offended against the law ecclesiastical, that he is entitled to an acquittal from the charges now laid against him. I deem it to be my duty to consider whether the defendant be or be not proved to have offended against the laws ecclesiastical in the matter of one or more, or all, of these criminal charges, and to give my decision accordingly.

I have been referred to a case *Rex v. Sparks* (1), Cripps, Laws of the Church, 626; 2 Burn's Eccl. Law, 429. This was an indictment in the first year of James the Second against a clergyman, at the quarter sessions in Devonshire, for using alias preces in the church, and alio modo than mentioned in the Book of Common Prayer; and the indictment concluded contra formam statuti, &c. He was found guilty, and fined 100 marks. Upon writ of error, it was admitted that offences against these statutes might be inquired of by the justices, but the indictment was held bad, for that it ought to have alleged that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for that otherwise any person might be indicted who used prayers before his sermon other than such as are required by the Book of Common Prayer; and Mr. Cripps observes, that although this decision established that justices had jurisdiction in such cases, and that indictments, properly framed for offences against these statutes, might be inquired of by them, yet it is probable that indictments of this nature have been very rarely, if ever, preferred; for the jurisdiction of the ecclesiastical court was in no way taken away by those statutes. And wherever it may have been necessary to institute any penal proceedings against clergymen for the omission of, or addition to, anything contained in the Book of Common

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Prayer, the proceeding has probably been always in the ecclesiastical court; and, indeed, prosecutions in the temporal courts upon those statutes seem to have been discouraged by the judges; for in a case at the Thetford Lent assizes in 1795, a clerk was indicted upon these statutes, but the evidence was not that he left out or added any prayers, or altered the form of worship, but that he did not read prayers twice on a Sunday, but alternately one Sunday in the morning and the next in the evening, and omitted to read them at all on certain saints' days. Mr. Baron Perryn, who tried the indictment, observed that it was *primæ impressionis*, and being of opinion that the offence complained of was purely of ecclesiastical cognizance, and not the subject of prosecution in the temporal courts, directed the jury to acquit the defendant, which they accordingly did.

Looking at all the circumstances it does not appear to me that the case of *Rex v. Sparks* (1) is worthy of much attention, and it will in no way influence my judgment.

The principal heads under which the argument of the counsel for the promoter may be ranged appear to me to be the following:—

First. That as by each and all of the practices charged in these articles, a new rite or ceremony has been added by Mr. Mackonochie to those which are prescribed by the Statutes of Uniformity, such practices are unlawful.

Secondly. That these particular additions are expressly prohibited.

Thirdly. That they are by necessary implication prohibited, inasmuch as they are connected with Roman or Popish doctrines.

Fourthly. That as such they have, as a matter of fact, been disused ever since the Reformation.

Now it appears to me necessary to examine, in the first instance, these two last grounds of objection, inasmuch as a consideration of the weight due to them must affect the general application of the law—wherever it be obscure or ambiguous, or silent as to positive precept—to the particular subject of these criminal charges.

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I will, therefore, consider in the first instance what weight is to be ascribed to the proposition—

“That they are by necessary implication prohibited, inasmuch as they are connected with Roman or Popish doctrines.”



The counter proposition appears to be that the similarity of these ornaments and practices with those in the Church of Rome does not furnish a safe criterion whereby to try the question of their legality in the Church of England. That the true criterion is conformity with primitive and catholic use, and not antagonism to Rome.

A great part of the arguments addressed to me by the counsel on both sides was founded upon one or the other of these propositions.

I am very far from complaining of these arguments, or of the length to which they extended, for in my opinion a careful consideration of these propositions, however large, grave, and difficult, is a necessary preliminary to the due construction of the laws, formularies, and usages involved in the present inquiry.

They must, if this construction be doubtful, receive, so to speak, a colour and complexion from the judgment which is formed upon the spirit and principles which governed the reformation of our church.

It is my duty to form this judgment upon an historical examination—however unequal my powers may be to the task—into the principal acts of the State and the Church which, since the great epoch of the Reformation, have introduced, accompanied, and settled the ecclesiastical establishment of this kingdom.

It is scarcely necessary to say that where the language of a statute is plain I must obey it, or that where the court of appeal has laid down a principle applicable to this case, I must follow it. But, where I have no such guide, I must seek the exposition of the law from the general language of the cardinal statutes, the public and authoritative declarations which accompanied and illustrated them, the judicial construction which they have received, the formularies which these statutes ordered, whether with or without the concurrent sanction of the Church, though happily the latter alternative is of rare occurrence; I must also consider the canons which bind the clergy, and the opinions of the bishops and great divines of our church, who were not unfrequently also the councilors of the state and the authors of the formularies.

I propose to pursue my investigation in the following order: Identity in first, I will consult the law; secondly, I will have recourse to historical and theological statements.

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The inquiry into the law admits of the following sub-divisions: the statute law; the canons enacted since the Reformation; and the general common law of the Church.

In the history of no kingdom is the independence of the national church written with a firmer character than in that of England, in the statutes of the realm, in the decisions of judicial tribunals, and the debates of parliament. (1).

The Constitutions of Clarendon, in Henry the Second's reign (A.D. 1164), though directly aimed at the repression of the inordinate claims and privileges of the National Church, were, no doubt, indirectly "calculated," as Hume observes, "to establish the independency of England on the Papacy;" and therefore, when the King sought Pope Alexander's ratification of them, that pontiff annulled and rejected all but six out of the sixteen memorable articles.

The resistance of Beckett, and, still more, the general feeling excited by the wicked and impolitic murder of that prelate, procured the practical abrogation of the articles objected to, by the enactments of Edward I. and III., of Richard II., of Henry IV. and V., and of Edward IV.

But in the severe penalties attached to the Statutes of Provisors and Præmunire may be read the steady determination of the English people to maintain an independent national church, and to resist the ultramontane doctrines which had taken root in some other countries.

The Statute of Provisors (25th Edw. III., st. 6, A.D. 1350) recites that "the Holy Church of England" was founded in the "estate of prelacy within the realm of England" by the king and nobles of England, and forbids the prevalent abuses of the Pope's bestowing benefices upon aliens, "benefices of England which be of the advowry of 'the people of Holy Church,'" the reservation of first-fruits to the Pope, and the provision or reservation of benefices to Rome. By 38th Edward III., st. 2, c. 1 (A.D. 1363), persons receiving citations from Rome in courts pertaining to the king, &c., are liable to the penalty of 25th Edw. III.

The statute (A.D. 1392) 16 Richard II. c. 5, renders the procuring of bulls from Rome liable to præmunire, and it recites a

(1) Phillimore's International Law, vol. ii. pp. 412, 416.

variety of papal aggressions upon the privileges of the Crown; among other matters, as to the translation of bishops out of the realm, or from one bishopric to another within the realm; and the carrying of treasure out of the realm; and so the realm destitute as well of counsel, as of substance, to the final destruction of the said realm, and so the Crown of England, which hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality (la regalie) of the same crown, and to none other, should be submitted to the Pope, and the laws and statutes of the realm by him defeated and avoided at his will, in perpetual destruction of the sovereignty of the kingdom of the king and lord, his crown, his royalty, and of all his realm, which God defend.

This statute before the Reformation, and the subsequent enactment of 24 Henry VIII. c. 12, and the great case of *Cawdrey* (1) as reported by Lord Coke and corrected by Bishop Stillingfleet, may be said to contain a treatise on constitutional law of England upon the subject of the usurpation of the papal see upon the liberties of the national church, and in regard to the authority and privilege of the English Crown. It would be difficult to conceive a clearer or more dignified exposition of the law upon this subject than is contained in the prefatory part of the statute of Henry VIII. "Where by divers sundry old authentick histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spirituality and temporality, been bounden and owen to bear next to God a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice, and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates, and contentions, happening to occur, insurge, or begin within the limits thereof,

(1) 5 Co. Rep. 1. Stillingfleet's *Eccl. Cases*, "Of the Foundation of Ecclesiastical Jurisdiction," vol. ii. p. 49.

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without restraint or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the said body politic called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour sufficient, and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties as to their rooms spiritual doth appertain; for the due administration whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church both with honour and possessions; and the laws temporal for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged, and executed by sundry judges and ministers of the other part of the said body politic, called the temporality; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other."

At the period of the Reformation the national church introduced an express denial of the authority of the Pope,—henceforth called in all public acts and documents the Bishop of Rome,—into her articles and canons, and an acknowledgment of the temporal supremacy of the Crown over the ecclesiastical as well as the civil state. Henry VIII. was excommunicated, and in the bull his subjects were commanded to renounce their allegiance, and the nobles were ordered "*sub ejusdem excommunicationis ac perditionis bonorum suorum pœnis*," to unite with all Christian princes in expelling Henry from England. Elizabeth was excommunicated in pretty similar terms, but not until twelve years after her accession. In answer to a request from the emperor and other Roman Catholic princes, that she would allow the Roman Catholic places of worship, she replied that she would not allow them to keep up a distinct communion, alleging her reasons in these remarkable



words :—"For there was no new faith propagated in England ; no religion set up but that which was commanded by our Saviour, practised by the primitive church, and unanimously approved by the fathers of the best antiquity." The Roman Catholics, both in England and Ireland, appear to have outwardly conformed to the services of the church for about ten years.

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The peculiar character of the English people and the English Church is also strongly shewn in their determination not to admit the general body of the Canon law into these realms, but only such portions of it as were consistent with the Constitution, the Common Law, and the peculiar usages of the Anglican Church. The rules of the general Canon law were principally introduced into this country, and considerably modified in their introduction, through the medium of provincial constitutions passed by the authority of the metropolitans of England. It is true that the Pope endeavoured to maintain his authority in this matter by sending legates from time to time, and by the device of creating the Archbishop of Canterbury "legatus natus" of the Holy See. (1) But England possesses in her provincial constitutions, collected by Lyndewode, a body of domestic ecclesiastical law, upon which, before the Reformation, a national independent character was in many respects impressed. The common law was always disposed to recognize these constitutions, while to the general Canon law it always manifested considerable averseness.

But it has always been the doctrine of the temporal and ecclesiastical courts since the Reformation that the constitutions contained in Lyndewode, and the general usages of the Church, and certain portions of the Canon law admitted by those usages, are still binding upon the Church of this realm.

I will give some instances :—

So late as the year 1848 (*Burder v. Mavor*) (2) criminal articles were preferred against a clerk in holy orders for accepting a bene-

(1) "Thus much is evident, as Ger-vasius, in the life of William, at this time (anno 1125) Archbishop of Can-terbury, well observes, that the legatine power was looked upon as a breach of the law of England, and an invasion of the ancient liberties of the English Church and nation, as well as the rights of the sees of Canterbury and York in particular, and that the minds of men were scandalized and offended at it."—Inett's "*Origines Anglicanae*," vol. ii. p. 223.

(2) 6 N. of C. 1.

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fice with cure of souls whilst in possession of another benefice with a cure of souls without dispensation. The articles alleged that by the 29th canon of the 24th Council of Lateran, A.D. 1215, he was ipso jure deprived of the first living. Sir H. Jenner Fust observed at p. 3: "The first of the articles sets forth the law, namely, that by a decree of the Council of Lateran, when any person in possession of a benefice with cure of souls shall accept another like benefice, the former becomes void, that is, he loses that benefice, and that is the law of this country at this time. The statute of Henry VIII. does not affect this law, except that it makes the other living voidable; that is, by sentence, or void by presentation of the patron.

"Under these circumstances, the facts being proved, the Court is bound to sign a sentence declaring the perpetual curacy of Forest Hill void by Mr. Mavor's acceptance of another benefice with cure of souls."

In the case of *Saunders v. Head* (1) Sir Herbert Jenner Fust said: "It has been made a subject of complaint, on behalf of Mr. Head, that the articles do not contain any specification of the law relied on to establish them; that the first article is merely general, and that, under such general pleading, it is difficult for a defendant to know how to address himself to the question of law applicable to his case; that the Canon law has been referred to generally without particular specification.

"Now, the objection taken in this case is not taken for the first time; it has been frequently taken in this court, and, as often, overruled. The answer always given to the objection is, that where the general law ecclesiastical is relied on it is not necessary to plead specifically; that where the offence is one generally cognizable in the ecclesiastical court, it is not necessary to point out the particular canon or statute on which the proceedings are founded." (2)

In the case of *Kemp v. Wickes* (3) Sir John Nicholl said: "The law of the Church of England, and its history, are to be deduced

(1) 3 Curteis, at p. 577.

(2) Ibid. p. 579.

(3) 3 Phillim. at p. 276.

from the ancient general Canon law—from the particular constitutions made in this country to regulate the English Church—from our own canons—from the rubric, and from any acts of parliament that may have passed upon the subject; and the whole may be illustrated, also, by the writings of eminent persons.”

In the year 1866 a royal licence was granted to Convocation to alter certain canons of 1603; the licence recited the 25th of Hen. 8, c. 29, restraining the meeting of Convocation, and continued as follows:—

“And further, by the said act, it is provided that no canons, constitutions, or ordinance should be made or put in execution within this realm, by authority of the Convocation of the clergy, which shall be contrariant or repugnant to the King’s prerogative royal, or the customs, laws, or statutes of this realm, anything in the said act to the contrary thereof notwithstanding; and, lastly, it is also provided by the said act that such canons, constitutions, ordinances, and synodals provincial which then were already made, and which were not contrary or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King’s prerogative royal, should then still be used and executed as they were upon making of the said act, till such time as they should be viewed, searched, or otherwise ordered and determined by the persons mentioned in the said act, or the more part of them, according to the tenor or form and effect of the said act, as by the said act amongst divers other things more fully and at large it doth and may appear.”

Having made these observations with regard to the connexion that subsists between the law as to the Church before and after the Reformation, I will now advert to the evidence of identity furnished by our history and theology since the Reformation.

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In 1549, Edward the Sixth’s government, in their message to the Devonshire rebels, state: “As for the service in the English tongue, it seemeth to you a new service, and, indeed, is none other but the old—the self-same words in English which were in Latin, saving a few things taken out.” (1)

Constant references are made in the Homilies, which were produced under the auspices of Cranmer early in the reign of

(1) Foxe, Acts and Mon., vol. ii. Book ix. p. 15.

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Edward VI., to the "usages of the primitive Church," and the "sentences and judgments of the most ancient, learned, and godly doctors of the Church."

Collier (1), speaking of the various influences at work during this reign, says: "Peter Martyr concurred with Bucer in his animadversions upon the Common Prayer Book, as appears by his letter to him upon that subject.

"However, from what has been observed, the reader may perceive Bucer was somewhat overcharged with scruples, and carried his censure too far. Neither are his remarks at all reconcileable with his concessions in the beginning of his discourse. And, amongst other things, his setting aside antiquity with so much ease is particularly remarkable. There is a great deference, without doubt, due to the authority of the first centuries. It was then the apostolical traditions were fresh, miracles were frequent, and the Church under the conduct of a distinguishing illumination. Then secular views and projects of ambition were foreign to inclination. Under such opportunities and qualifications, what room is there for suspicion of ignorance or foul dealing? To reject the usages of the ancient Church, because we do not meet with them in Scripture, is no good logic. It is plainly not the design of the New Testament to furnish liturgies and rituals. The converts to St. Peter's sermon continued stedfastly in breaking of bread (2); that is, administering the holy eucharist; and in prayers. But what the prayers were at this solemnity is nowhere delivered in Scripture. Where the extraordinary effusions of the Holy Ghost were not supplied, things of this nature were left to the discretion of the spiritual directors, who were to govern themselves by St. Paul's general rule: 'Let all things be done decently and in order.' (3)

"It is true, if the religious customs of antiquity were plainly inconsistent with the doctrine of the inspired writings, we ought to stand off from them; but in other cases our Saviour's saying is applicable to the present purpose, 'He that is not against us, is for us.' And when the governors of the Church are under no restraint as to ceremonies and compositions, what should hinder

(1) Ecclesiastical History of Great Britain, Part ii. Book iv. p. 299.

(2) Acts ii. 42.

(3) 1 Cor. xiv.



them from following their judgments, and directing as they think fit? 'For where there is no law there can be no transgression.' What should hinder them in this case from enlarging the circumstances of worship, from assisting the memory, raising the affections, and explaining the mysteries, with additional ceremonies and devotions?

"His objection against primitive usages, because they have been overvalued and misapplied by the church of Rome, goes upon a mistaken ground; for, granting the allegations hold good, there is no consequence in the reasoning. To argue from the abuse against the use of things is the way to take our bibles from us; for what book has been more abused than the inspired text? By this topic almost everything in religion and nature must be contraband and prohibited. Bucer was formerly sensible of this fallacy; he saw the danger of disputing at this rate, and determines against it. To quit antiquity in any custom because it is continued in the church of Rome has neither reason nor charity in it. It is a peevish principle, and helps to keep up a spirit of division. We ought rather to lament the breaches in the Church than make them wider. All reproachful language, humoursome distance, and unnecessary squabbles, serve only to exasperate one part of Christendom against another, and make our common religion the jest of infidels and atheists."

The same author (1) thus introduces the subject of the apology of Jewel, which is referred to in the 36th of the Canons of 1603:—

"The next remarkable occurrence is Bishop Jewel's sermon at Paul's Cross. It was preached in Lent this year, upon these words of the apostle Paul—'I have received of the Lord that which also I deliver unto you.' From this text he took occasion to make that remarkable challenge in defence of the Reformation. The Church of England was reproached with novelty by the Papists, and charged with departing from primitive doctrine and practice. To wipe off these aspersions the Bishop put the case upon a bold issue, and declared in the pulpit, 'That if any learned men of all our adversaries, or if all the learned men that are alive, are able to bring any one sufficient sentence out of any old Catholic doctor

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(1) Coll. Eccl. History, Part ii. Book vi. p. 461.

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or father, or out of any old general council, or out of the Holy Scriptures of God, or any one example of the primitive church, whereby it may be plainly and clearly proved, that for the first six hundred years after Christ there was any private mass in the world; or that there was any communion administered under one kind; or that the people had their common prayer in a language which they did not understand; or that the Bishop of Rome was then called universal bishop or head of the universal church; or that the people were then taught to believe that Christ's body is really, substantially, corporally, carnally, or naturally in the sacrament,' &c. &c.

“If any one of his adversaries were able to make good but a single proposition amongst all these, either by sufficient declarations in Scripture, or by the testimony of the ancient fathers and councils, he was ready to give up the contest and subscribe himself a proselyte.”

It is not unworthy of remark that in the Canon of 1571, concerning preachers, it is ordered, “*Inprimis vero videbunt ne quid unquam doceant pro concione, quod a populo religiose teneri et credi velint, nisi quod consentaneum sit doctrinæ Veteris aut Novi Testamenti, quodque ex illa ipsa doctrina Catholici patres et veteres episcopi collegerint.*” (1)

The Puritans did not dispute the lawfulness of set forms of prayer, but they were to be such as were used in Geneva and Scotland. (2) But Bishop Burnet observes, speaking of the year 1548 (3): “It being resolved to bring the whole worship of God under set forms; they (our Reformers) set one general rule to themselves (which they afterwards declared) of changing nothing for novelty's sake, or merely because it had been formerly used. They resolved to retain such things as the primitive Church had practised, cutting off such abuses as the latter ages had grafted on them, and to continue the use of such other things which, though they had been brought in not so early, yet were of good use to beget devotion, and were so

(1) Cardwell's *Synodalia*, vol. i. p. 78.

p. 126.

(3) *History of Reformation*, Book i.

(2) Neale's *History*, p. 236; Madox, Part 2, Oxford, 1816, vol. ii. p. 135.

much recommended to the people by the practice of them that the laying aside these would, perhaps, have alienated them from the other changes they made; and, therefore, they resolved to make no change without very good and weighty reason. In which they considered the practice of our Saviour, who did not only comply with the rites of Judaism himself, but even the prayer he gave to his disciples was framed according to their forms; and his two great institutions of baptism and the eucharist did consist of rites that had been used among the Jews; and since he who was delivering a new religion, and was authorized in the highest manner that ever any was, did yet so far comply with received practices as from them to take those which he sanctified for the use of his church, it seemed much fitter for those who had no such extraordinary warrant to give them authority in what they did, when they were reforming abuses, to let the world see they did it not from the wanton desire of change or any affectation of novelty, and with those resolutions they entered on their work."

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I now approach an authority to which almost universal homage has been accorded,—the authority of Hooker. (1)

"They," he says, "which measure religion by dislike of the church of Rome, think every man so much the more sound by how much he can make the corruption thereof to seem more large; and, therefore, some there are, namely, the Arians in reformed churches of Poland, which imagine the canker to have eaten so far into the very bones and marrow of the church of Rome as if it had not so much as a sound belief, no, not concerning God himself, but that the very belief of the Trinity were a part of antichristian corruption; and that the wonderful providence of God did bring to pass that the bishop of the see of Rome should be famous for his triple crown—a sensible mark whereby the world might know him to be that mystical beast spoken of in the Revelation, to be that great and notorious antichrist in no one respect so much as in this, that he maintaineth the doctrine of the Trinity. Wisdom, therefore, and skill is requisite to know what parts are sound in that church, and what corrupted.

"Neither is it to all men apparent which complain of unsound parts, with what kind of unsoundness every such part is possessed.

(1) Hooker, Book iv. chap. viii. 2.

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They can say, that in doctrine, in discipline, in prayers, in sacraments, the church of Rome hath (as it hath indeed) very foul and gross corruptions, the nature whereof, notwithstanding because they have not for the most part exact skill and knowledge to discern, they think that amiss many times which is not; and the salve of reformation they mightily call for, but when and what the sores are which need it, as they wot full little, so they think it not greatly material to search.

“That the church of Rome doth hereby take occasion to blaspheme, and to say our religion is not able to stand of itself unless it lean upon the staff of their ceremonies, is not a matter of so great moment that it need to be objected, or doth deserve to receive an answer. The name of blasphemy in this place is like the shoe of Hercules on a child’s foot. If the church of Rome do use any such kind of silly exprobaton, it is no such ugly thing to the ear that we should think the honour and credit of our religion to receive thereby any great wound. They which hereof make so perilous a matter do seem to imagine that we have erected of late a frame of some new religion, the furniture whereof we should not have borrowed from our enemies, lest they relieving us might afterwards laugh and gibe at our poverty; whereas in truth the ceremonies which we have taken from such as were before us are not things that belong to this or that sect, but they are the ancient rites and customs of the Church of Christ, whereof ourselves being a part, we have the selfsame interest in them which our fathers before us had, from whom the same are descended unto us. (1)

“No man which is not exceeding partial can well deny but that there is most just cause wherefore we should be offended greatly at the church of Rome. Notwithstanding at such times as we are to deliberate for ourselves, the freer our minds are from all distempered affections the sounder and better is our judgment. When we are in a fretting mood at the church of Rome, and with that angry disposition enter into any cogitation of the orders and rites of our Church, taking particular survey of them, we are sure to have always one eye fixed upon the countenance of our enemies,

(1) Hooker, Book iv. chap. ix.



and according to the blithe or heavy aspect thereof our other eye sheweth some other suitable token either of dislike or approbation towards our own orders. For the rule of our judgment in such case being only that of Homer, 'This is the thing which our enemies would have' (1), what they seem contented with, even for that very cause we reject; and there is nothing but it pleaseth us much the better if we espy that it galleth them.

"Miserable were the state and condition of that Church the weighty affairs whereof should be ordered by those deliberations wherein such a humour as this were predominant. We have most heartily to thank God, therefore, that they amongst us to whom the first consultations of causes of this kind fell, were men which aiming at another mark, namely, the glory of God and the good of this his church, took that which they judged thereunto necessary, not rejecting any good or convenient thing only because the church of Rome might perhaps like it."

The Puritans at the Hampton Court Conference, in the reign of James I., vehemently objected to the sign of the cross in the sacrament of baptism, and the reply to their objections, incorporated in the thirtieth canon (of 1604), deserves the careful study of those who would thoroughly understand the mind of the English Church upon the subject now under consideration:

"So that for the very remembrance of the cross, which is very precious to all of them that rightly believe in Jesus Christ, and in the other respects mentioned, the Church of England hath retained still the sign of it in baptism, following therein the primitive and apostolical churches. . . . And this use of the sign of the cross in baptism was held in the primitive church, as well by the Greeks as the Latins, with one consent and great applause. At what time, if any had opposed themselves against it, they would certainly have been censured as enemies of the name of the cross, and consequently of Christ's merits, the sign whereof they could no better endure. This continual and general use of the sign of the cross is evident by many testimonies of the ancient fathers."

"It must be confessed that in process of time the sign of the cross was greatly abused in the church of Rome, especially after that corruption of popery had once possessed it. But the abuse of

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(1) Ἡ κεν γηθήσαι Πρίαμος. II. A. 255.

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a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the churches of Italy, France, Spain, Germany, or any such like churches, in all things which they held and practised, that, as the apology of the Church of England confesseth, it doth with reverence retain those ceremonies which doth neither endamage the church of God nor offend the minds of sober men, and only departed from them in those particular points wherein they were fallen both from themselves in their ancient integrity, and from the apostolical churches which were their first founders." (1)

Dr. Jackson, who was president of Corpus Christi College and dean of Peterborough, one of our most learned divines, writing A.D. 1629, in his treatise of the Holy Catholic Faith and Church, says (2), "That the title of *Catholic* is proper and essential unto the faith professed by the present visible Church of England, but cannot truly be attributed to the faith or creed of the *modern visible Romish* church.

"Whether the name *Catholic* were first bestowed upon the Church, or upon that faith which is the life and soul of the holy apostolic church, shall be no part of our inquiry. It sufficeth that the name *Catholic* itself is univocal in respect both of church and faith. True faith is therefore *Catholic* faith, because it is the only door or way unto salvation, alike common unto all, without national or topical respect. Whosoever of any nation have been saved, have been saved by this one and the same faith, and whoever will be saved (as Athanasius speaks) must hold this *Catholic faith*, and he must hold it *pure and undefiled*. The main question then is, who they be that hold this *Catholic faith*, and whether they hold it *undefiled or no*. Were Vincentius' rules as artificial as they are orthodoxal and honest, the issue betwixt us and the Romanist would be very easy and triable. But let us take them as they are: 'Id Catholicum est quod ab omnibus ubique et semper, etc.' 'That is catholic which is held by all, in all places, and at all times.'

"The three special notes of the catholic faith or church by him required are *universality, antiquity* and *consent*. Whether these

(1) Canon 30. (The Lawful Use of the Cross in Baptism Explained.) Cardwell's Synodalia, i. 261.

(2) Works, vol. xii. chap. 21, p. 161, edit. 1845.

three members be different or subordinate, and oftentimes coincident, I leave it to be scanned by logicians. According to the author's limitation, all three marks agree to us, not to the Romanist."

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"The fallacy by which the Romanists deceive poor simple people is in making them believe that our religion and their religion, our faith and their faith, are *duo prima diversa*, or so totally distinct that part of the one could not be included in the other. But for the *universality* of our faith we have every member of the Romish church a suffragant or witness for us. First, nothing is held as a point of faith in our Church but the present Romish church doth hold the same, and confess the same to have been held by all orthodoxal antiquity. So that for the *form* of faith established in our church, we have the consent of the primitive church, of the four first general councils, of all succeeding ages unto this present day, the consent likewise of the present Romish church, and of ourselves. Now, as France is a great deal bigger than Normandy, if we compare them as distinct and opposite, and yet France and Normandy is bigger than France without Normandy, so likewise though the present visible Romish church be much greater than the Church of England, yet seeing the Romish church, how great soever, doth hold all the points of faith which our Church doth for catholic and orthodoxal, our consent and their consent, our confession and their confession, is more universal than their consent without ours. But if their consent unto the points of faith believed by us prove our faith to be universal, and our church by consequence to be *catholic*, why should not our consent unto the points of faith believed by them prove their faith to be universal, or their church to be *catholic*? Because it is not enough to hold all points of catholic faith, unless the same points be kept *holy and undefiled*. The Romish church, we grant, doth hold all points of catholic faith, and so far as she holds these points we dissent not from her; yet dissent from her we do in that she hath *defiled* and polluted the catholic faith with new and poisonous doctrines, for which she neither hath the consent of antiquity, nor of reformed churches."

And again, answering that silly taunt of the Romanists, "Where was your church before the Reformation?" he observes: "The question is much the same as if they should ask us, where was

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King Henry VII.'s kingdom, where were his subjects, where was your commonweal, whilst Richard III. did call parliaments, and sway the sceptre of this kingdom? The kingdom of Henry VII. and of his successors, or the English commonweal, was in the same place then as now it is. The deposition of the tyrant, the dissolution of the tyranny, and the reducing of English subjects to their true allegiance, did work no essential alteration in the common weal of the kingdom, but only a reformation of the government, and reducement of it to the fundamental laws of the land.

“No more did the rejection of the Romish church's usurped authority in matters spiritual induce any substantial alteration in the English Church, but a reformation or reduction of it unto the fundamental constitution of the primitive church.” (1)

In the warrant issued by Charles II. for the conference at the Savoy, which preceded the adoption of our present prayer-book (2), a commission of certain persons is appointed to advise upon and review the said Book of Common Prayer, comparing the same with the most ancient liturgies which have been used in the Church in the primitive and purest times.

So careful were the compilers of this great treasure of the Church that it should speak the Catholic language, to which Christian ears and hearts had been accustomed, while the apostolical spirits and doctrine still guided the undivided Church.

Hear on this subject the erudite and eloquent Donne: “If they (the Roman Catholics) say, we are perplexed with differences of opinions amongst ourselves, let this satisfy them, that we do agree all, in all fundamental things; and that in things much nearer the foundation than those in which our differences lie, they differ amongst themselves, with more acrimony and bitterness than we do. If they think to perplex us with the fathers, we are ready to join that issue with them; where the fathers speak unanimously, dogmatically, in matters of faith, we are content to be tried by the fathers. If they think to perplex us with councils, we will go as far as they in the old ones; and as far as they for meeting in new councils, if they may be fully, that is, royally, imperially, called, and equally proceeded in, and the resolutions grow and gathered

(1) Vol. xii. p. 131.

(2) Cardwell's Conferences, p. 300.



there upon debatements, upon the place, and not brought thither upon commandment from Rome." (1)

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Bishop Cosin, an authority of special significance and weight, because he largely assisted in the compilation of our prayer-book, says (2): "In truth we have continued the old religion: and the ceremonies which we have taken from them that were before us are not things which belong to this or that sect, but they are the ancient rites and customs of the church of Christ, whereof ourselves being a part, we have the selfsame interest in them which our fathers before us had, from whom the same descended to us.

. . . To abrogate those things without constraint of apparent harm thence arising had been to alter unjustly the universal practice of the people of God and those general decrees of the fathers, which (in St. Augustine's language) is madness and insolence to do, both in respect of the universal authority of the Church, which no particular church has power to control, and also in regard of reasons aforementioned."

Archbishop Bramhall, who wrote in 1677 his *Just Vindication of the Church of England, &c.*, says: "But it is not enough to charge the court of Rome unless we can discharge ourselves, and acquit our own church, of the guilt of schism which they seek to cast upon us. First, they object that we have separated ourselves schismatically from the communion of the Catholic church. God forbid! Then we will acknowledge, without any more to do, that we have separated ourselves from Christ, and all his holy ordinances, and from the benefit of his passion, and all hope of salvation.

"But the truth is, we have no otherwise separated ourselves from the communion of the Catholic church than all the primitive orthodox fathers, and doctors, and churches did long before us, that is, in the opinion of the Donatists, as we do now in the opinion of the Romanists; because the Romanists limit the Catholic church now to Rome in Italy, and those churches that are subordinate to it, as the Donatists did then to Cartenna in Africa, and those churches that adhered to it. We are so far from separating ourselves from the communion of the Catholic church, that we

(1) Donne's Works, vol. iii. p. 11. Book of Common Prayer; Works, vol.

(2) Notes on the Prefaces to the v. pp. 13, 15.

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make the communion of the Christian church to be thrice more Catholic than the Romanists themselves do make it, and maintain communion with thrice so many Christians as they do. But how much our church should make itself, as the case stands, more Roman than it is, by so much it should thereby become less Catholic than it is." (1)

"As for my religion," said the holy Ken, with almost his latest breath, "I die in the holy catholic and apostolic faith, professed by the whole church before the disunion of east and west; more particularly I die in the communion of the Church of England, as it stands distinguished from all papal and puritan innovations, and as it adheres to the doctrine of the cross."

Bishop Beveridge compiled, with infinite labour and accuracy, a *Codex Canonum Ecclesiæ Primitivæ vindicatus ac illustratus*: in his preface to which are these words (s. vi.), "For when this our English church, through long communion with the Roman church, had contracted like stains with her, from which it was necessary that it should be cleansed, they who took that excellent and very necessary work in hand, fearing that they like others, might rush from one extreme to the other, removed indeed those things, as well doctrines as ceremonies, which the Roman church had newly and insensibly superinduced, and, as was fit, abrogated them utterly. Yet notwithstanding whatsoever things had been at all times believed and observed by all churches in all places, those things which they most religiously took care not so to abolish with them. For they well knew that all particular churches are to be formed on the model of the universal church, if indeed, according to that general and received rule in ethics 'every part which agreeth not with its whole is therein base.' Hence, therefore, these first reformers of this particular church, directed the whole line of that reformation which they undertook, according to the rule of the whole or universal church, casting away those things only which had been either unheard of or rejected by the universal church, but most religiously retaining those which they saw, on the other side, corroborated by the consent of the universal church. Whence it hath been brought to pass, that although we have not

(1) Bramhall's Works, folio, Dublin, chap. ix.; Oxford edit. (1842), vol. i. p. 257.

communion with the Roman, nor with certain other particular churches, as at this day constituted, yet have we abiding communion with the universal and Catholic church, of which evidently ours, as by the aid of God first constituted, and by his pity still preserved, is the perfect image and representation." (1)

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Observe how Barrow speaks in his treatise on the Pope's Supremacy of the Council of Trent. "Their new creed," he says, "of Pius IV. containeth these novelties and heterodoxies: (1) Seven sacraments; (2) Trent doctrine of justification and original sin; (3) Propitiatory sacrifice of the mass; (4) Transubstantiation; (5) Communicating under one kind; (6) Purgatory; (7) Invocation of saints; (8) Veneration of reliques; (9) Worship of images; (10) The Roman church to be the mother and mistress of all churches; (11) Swearing obedience to the Pope; (12) Receiving the decrees of all synods and of Trent." (2)

Bishop Sanderson (3) believed that "all men would be found much mistaken who account all popery that is taught or practised in the church of Rome. Our godly forefathers, to whom (under God) we owe the purity of our religion, and some of whom laid down their lives for the defence of the same, were, sure, of another mind, if we may, from what they did, judge what they thought. They had no purpose (nor had they any warrant) to set up a new religion, but to reform the old, by purging it from those innovations, which on tract of time (some sooner, some later) had mingled with it, and corrupted it both in the doctrine and worship. According to this purpose they produced, without constraint or precipitancy, freely and advisedly, as in peaceable times, and brought their intentions to a happy end, as by the results thereof contained in the articles and liturgy of our church, and the prefaces thereunto, doth fully appear. From hence chiefly, as I conceive, we are to take our best scantling, whereby to judge what is, and what is not, to be esteemed popery. All those doctrines then held by the modern church of Rome, which are either contrary to the written Word of God, or but superadded thereunto as necessary points of faith to be of all Christians believed under pain of damnation; and all those superstitions used in the worship of God which

(1) Beveridge's Works, Oxford (1848), vol. xi. p. xxiii.

(2) Ad finem.

(3) Died in 1663.

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are either unlawful as being contrary to the Word; or being not contrary and therefore arbitrary and indifferent, are made essentials, and imposed as necessary parts of worship: these are, as I take it, the things whereunto the name of popery doth properly and peculiarly belong. But as for the ceremonies used in the church of Rome which the Church of England at the Reformation thought fit to retain, not as essential or necessary parts of God's service, but only as accidental and mutable circumstances attending the same, for order, comeliness, and edification's sake; how these should deserve the name of popish, I so little understand, that I profess I do not yet see any reason why, if the Church had then thought fit to have retained some other of those which were then laid aside, she might not lawfully have so done; or why the thing so retained should have been accounted popish. The plain truth is this: the Church of England meant to make use of her liberty and the lawful power she had (as all the churches of Christ have, or ought to have) of ordering ecclesiastical affairs here; yet to do it with so much prudence and moderation that the world might see by what was laid aside, that she acknowledged no subjection to the see of Rome; and by what was retained, that she did not secede from the church of Rome out of any spirit of contradiction, but as necessitated thereunto for the maintenance of her just liberty. The number of ceremonies was also then very great and thereby burdensome, and so the number thought fit to be lessened. But for the choice which should be kept and which not, that was wholly in her power and at her discretion. (1)

Bishop Smalridge, the accomplished friend of Addison, wrote a sermon on the authority of the governors of our church, to prescribe rites and ceremonies (vol. i. p. 145), in the course of which he said:—

“But because those who allow some rites to be lawful may entertain some doubts concerning the use of ours, as apprehending them to have some particular faults which do not belong to all ceremonies in general, I shall proceed to clear those which we of this church are required to observe, from such objections as are brought to prove them unlawful and unwarrantable. Those who scruple the use of them allege it as one main ground of their

(1) Preface to fourteen sermons.



scruples, that those ceremonies which are used in our church are also used in the church of Rome, and they are therefore cautious of observing them, lest they should thereby countenance the errors and corruptions of that church. Now this would be a good argument against the usage of such rites, if it could be proved that those who err in some things do certainly err in everything; or, that we ought to show our abhorrence of the corruptions of a church by condemning and abolishing even those usages which have nothing in them but what is innocent and incorrupt. But we have not declared war against those of that church as they are Christians, but as they are perverters of the Gospel of Christ; we do not profess to differ from them in everything, but only in such things wherein we apprehend them to have degenerated from the pure and undefiled church of Christ.

“We think that we should not be able to vindicate ourselves from the charge of schism, which they bring against us, if whatever doctrine they held, whatever rite they practised, that we should, for no other reason but because they held and practised it, forthwith condemn and reject.

“The ablest champions for the cause of the Reformation have always thought it the best answer against the charge of schism, to allege and prove that we have no further departed from them than they departed from the pure and primitive church of Christ. What is contrary to the purity of the Gospel, that we reject; not because popish, but because repugnant to the laws and doctrines of Christ: what is noways contradictory to the simplicity of the Gospel, what may be subservient to piety, that we retain; not because practised by the church of Rome, but because agreeable to the rules of the Gospel. If there be anything in our ceremonies that is sinful, they ought presently to be abolished, though there was nothing of the same kind practised by those of the Roman communion. (1) What is decent and laudable in them cannot lose its worth and value, because others have them in common with us. If it be laid down as a good rule of reformation that we must depart as far as possible from Rome, we must renounce the articles

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(1) About this time Archbishop Tenison wrote a remarkable “Discourse of Idolatry” (chap. xii. p. 279), and upon this principle vindicated the use of images and pictures in the Church of England.

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of our creed, because they of that church profess to believe them; we must declare ourselves to be Socinians that we may be thought staunch Protestants; and we must renounce the doctrine of the Trinity, because it is held by those who do also hold that of transubstantiation. In the Romish religion there are some things evil, some things good, some things wholly indifferent. Whatever is sinful in that communion we are bound to reject, and have, we think, accordingly rejected; what is good we ought to retain, and therefore do retain; what was indifferent, it was at the discretion of our reformers either to keep or change, as they thought should be more expedient. Private persons may, according to the variety of their judgments, think some things might have been kept which were left off, or some things might have been dropped which are still kept; but unless they can prove those that have been abolished to be necessary, or those that are reserved to be unlawful, they are bound quietly to submit to the abolition of the former, and to the usage of the latter."

Bishop Bull, writing in 1705 on "The Corruptions of the Church of Rome, in answer to the Bishop of Meaux' Queries," thus maintains the true position of our church:—

"I proceed to the bishop's questions: He asks me what I mean by the Catholic church? I answer, What I mean by the Catholic church, in the book, which he all along refers to, I have already shown, and the very title of the book sufficiently declares. If he asks me what I mean by the Catholic church, speaking of it as it now is? I answer, by the Catholic church, I mean the Church Universal, being a collection of all the churches throughout the world, who retain the faith ( $\alpha\pi\alpha\chi$ ) once delivered to the saints (1); that is, who hold and possess in the substance of it, that faith and religion which was delivered by the apostles of Christ to the first original churches, according to Tertullian's rule before mentioned. Which faith and religion is contained in the Holy Scriptures, especially of the New Testament, and the main fundamentals of it comprised in the canon or rule of faith, universally received throughout the primitive churches, and the possession thereof acknowledged to be a sufficient tessera or badge of a Catholic Christian. All the churches at this day which hold and

(1) Jude iii.

profess this faith and religion, however distant in place, or distinguished by different rites and ceremonies, yea, or divided in some extra-fundamental points of doctrine, yet agreeing in the essentials of the *Christian* religion, make up together one Christian Catholic church under the Lord Christ, the supreme head thereof. The Catholic church under this notion is not a confused heap of societies separated one from another.”—These are important words.—“But it seems, no other union of the church will satisfy the bishop, but an union of all the churches of Christ throughout the world, under one visible head, having a jurisdiction over them all, and that head the Bishop of Rome for the time being. But such an union as this was never dreamed of amongst Christians for at least the first six hundred years, as shall be shown in its due place.”

In addition to this mass of evidence derived from the writings of English divines, I may cite the following testimonies to the same effect from the works of three distinguished foreigners, who watched with deep interest the form which the Reformation of the Church took in England, Isaac Casaubon, Hugo Grotius, and Saravia:—

Casaubon [ad Salmas Epist. 837, p. 489], A.D. 1612: “Quod si me conjectura non fallit totius Reformationis pars integerrima est in Anglia, ubi cum studio veritatis viget studium antiquitatis.”

Casaubon [Epist. ad Cardinal Perron, p. 494]: “Parata est Ecclesia Anglicana fidei suæ reddere rationem, et rebus ipsis evincere, auctoribus Reformationis hic institutæ non fuisse propositum novam aliquam ecclesiam condere, ut imperiti et malevoli calumniantur; sed quæ erant collapsa, ad formam revocare quàm fieri possit optimam; optimam autem judicarunt nascenti Ecclesiæ ab Apostolis traditam, et proximis seculis usurpatam.”

Hugo Grotius [Epist. ad Boetsæler, Ep. 62, p. 21, ed. 1637]: “Certum est mihi *λειτουργίαν* Anglicanam, item morem imponendi manus adolescentibus in memoriam Baptismi, auctoritatem Episcoporum, et Presbyteria ex solis Pastoribus composita, multaque alia ejusmodi, satis congruere institutis vetustioris Ecclesiæ, à quibus in Galliâ et Belgio recessum negare non possumus.”

[Epist. ad Corvinum, Epist. p. 434]: “Qui illam optimam antiquitatem sequuntur ducem, iis non eveniet ut multum sibi ipsi

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sint discolores. In Angliâ vides quam bene processerit dogmatum noxiorum repurgatio; hâc maxime de causâ, quod qui id sanctissimum negotium procurandum suscepere, nihil admiserint novi, nihil sui, sed ad meliora secula intentam habuere oculorum aciem."

Hadrian Saravia, the friend of Hooker: "Among others that have reformed their churches, I have often admired the wisdom of those who restored the true worship of God to the Church of England,—who so tempered themselves, that they cannot be reproved for having departed from the ancient and primitive customs of the church of God; and that moderation they have used, that by their example they have invited others to reform, and deterred none." (1)

In 1851, the Archbishops of Canterbury and York and twenty bishops published a statement in which they set forth "the undoubted identity of the Church before and after the Reformation;" and that at the Reformation the English church rejected certain corruptions, and established "one uniform ritual," but "without in any degree severing her connexion with the ancient Catholic church." (2)

In 1867, eight primates and sixty-eight bishops assembled from all parts of the globe, under the presidency of the Metropolitan of Canterbury.

The resolutions of this conference were prefaced by the following introduction:—

"We, Bishops of Christ's Holy Catholic Church, in visible communion with the United Church of England and Ireland, professing the faith delivered to us in Holy Scripture, maintained by the primitive church, and by the fathers of the English Reformation, now assembled, by the good providence of God, at the archiepiscopal palace of Lambeth, under the presidency of the Primate of all England, desire, first, to give hearty thanks to Almighty God for having thus brought us together for common counsels and united worship; secondly, we desire to express the deep sorrow with which we view the divided condition of the flock of Christ throughout the world, ardently longing for the fulfilment

(1) Wordsworth's *Theophilus Anglicanus*, p. 171.

vol. ii. p. 422; and the *Guardian*, April 2, 1851.

(2) Phillimore's *International Law*,



of the prayer of our Lord, 'That all may be one, as thou, Father, art in me, and I in thee, that they also may be one in us, that the world may believe that thou hast sent me;' and, lastly, we do here solemnly record our conviction that unity will be most effectually promoted by maintaining the faith in its purity and integrity, as taught in the Holy Scriptures, held by the primitive church, summed up in the creeds, and affirmed by the undisputed general councils."

But, after all, no argument for the continuity of the Church of England can be stronger than that which is derived from the structure, order, and contents of the prayer-book. It contains the *breviarium*, in which, towards the end of the eleventh century, had been inserted all the offices of the canonical hours, called also *portiforium*, and in England *portuary*, the *missale*, or the service for the holy communion, and the *ordinale*, which is referred to under the name of the "Pie" in the preface. There were various "uses" or prayer-books in England, known as the Salisbury, the York, the Bangor, and the Hereford uses, and others. The most celebrated appear to have been the *portiforium* or breviary of Sarum, which contained the daily services; the Sarum missal, which contained the holy communion service; and the Sarum manual, a book of occasional offices. These books of devotion seem to have been compiled by Osmund, Bishop of Salisbury, about the time of the Conquest; and in 1531 a reformed edition of the Sarum *portiforium* was reprinted, and shortly afterwards a reformed missal was published. There were also primers, which contained in a vulgar tongue large portions of the service in use amongst the people. In 1536 the Roman breviary was reformed, and published by a Spanish bishop, Cardinal Quignonez; and in 1544, Hermann, Archbishop of Cologne, whom the Pope, during the early sittings of the council of Trent, deprived (1), published a reformed ritual. (2)

In 1542, Henry VIII. directed convocation to consider the revision of the books of devotion then in use in this country. It is probable that the fruit of their labours, as well as the other works to which reference has been made, were laid before the royal

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(1) *Istoria del Concil. Trident.* — Sarpi, lib. ii. s. 59.

(2) See Preface to Annotated Book of Common Prayer.

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visitors appointed by Edward VI. in January, 1546-7, and the committee of convocation, to whom the preparation of the prayer-book of 1549 was entrusted.

The whole prayer-book, in fact, with very inconsiderable exceptions, consists of a translation of the ancient liturgies, and especially of the liturgy used by the western church. And we learn from the preface to the prayer-book that the object was to restore that "godly and decent order of the ancient fathers," which had been broken, and to introduce an order of prayer and reading of Holy Scripture "agreeable to their mind and purpose;" and that all suggested alterations which "secretly struck at some laudable practice of the whole Catholic church of Christ" were rejected; and that the calendar contained a "table of feasts, vigils, fasts, and days of abstinence," which were in accordance with primitive and catholic use; while the ornaments of the church and the vestments of the ministers were such as to present to the people some of the most prominent features of the ancient service, and were for this reason the ground of unceasing attack from the Puritans and the disciples of the Genevan school. And it is the observation of Mr. Hallam, while speaking of the Roman Catholics, "that it was always held out by our church, when the object was conciliation, that the liturgy was essentially the same with the mass book." (1)

These premises, which I have stated at some length, lead me to the conclusion that no sound argument against the lawfulness of the matters objected to in these articles can be deduced from the mere fact of their identity with the ceremonies in use before the Reformation.

I will next consider the argument founded on the alleged *de facto* disuse, since the Reformation, of the ceremonies or ornaments complained of in these articles.

It assumes this kind of shape:—

"If these things were legal, they would have been in use; their non-usage is almost fatal to their claim of legality; the presumption of law is strongly against them; and in order to refute that presumption a continuous usage must be established by those who maintain their lawfulness."

(1) Constitutional History, vol. i. 92, n. (ed. 1827).

Argument  
 from Disuse.

12-8-90

This argument seems to have been in the mind of the judge of the consistory of London in the Knightsbridge Church cases, though at the same time he strenuously asserted that no provision of statute or lawful canon could be abrogated by non-user. The doctrine of desuetude he repudiated, as unknown to the law of England.

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This argument from the long disuse of ornaments and observances, recently revived, cannot be altogether passed over.

The fact of disuse raises a practical prejudice, if not a legal obstacle, to all such revivals. The consideration of the causes which have induced it has a bearing upon the discussion of the questions which I am to adjudicate.

The argument appears to me to admit of two distinct answers.

In the first place, it proves too much; for perhaps there is no historical fact more certain than this, namely, that the law derived from the rubrics and canons has never, at any period since the Reformation, been universally and duly obeyed. The proposition is startling, but I think unquestionably true. The instances of disobedience are striking, if not many; take, as one example, the vestments of the clergy.

The rubric of Edward VI. provides:—

“And here it is to be noted, that such ornaments of the Church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward the Sixth.”

And the Judicial Committee of the Privy Council, in *Westerton v. Liddell* (1), most deliberately and emphatically decided that:

“The rubric to the prayer-book of January 1st, 1604, adopts the language of the rubric of Elizabeth; the rubric to the present prayer-book adopts the language of the Statute of Elizabeth; but they all obviously mean the same thing, that the same dresses and the same utensils or articles which were used under the first prayer-book of Edward VI. may still be used.” Their lordships say, “No difficulty will be found in discovering amongst the articles of which the use is there enjoined, ornaments of the church, as well as ornaments of the ministers. Besides the vest-

(1) Moore's Report of the Case, at pp. 157, 159.

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ments differing in the different services, the rubric provides for the use of an English Bible," &c.

The dresses of which the use is prescribed in the first prayer-book of Edward VI. are thus ordered:—

"Upon the day, and at the time appointed for the ministration of the holy communion, the priest that shall execute the holy ministry shall put upon him the vestures appointed for that ministration; that is to say, a white albe plain, with a vestment or cope."

"And whensoever the bishop shall celebrate the holy communion in the Church, or execute any other public ministration, he shall have upon him, beside his rochette, a surplice or albe, and a cope or vestment, and also his pastoral staff in his hand, or else borne or holden by his chaplain."

The canons of 1603 could not alter or affect the positive provisions of a statute; but, on the supposition that they alone were to be consulted, the use of the surplice in parish churches is distinctly enjoined by them (canon 58). Nevertheless I well recollect that when Bishop Blomfield published his celebrated charge in 1842, the expression therein of his opinion, that the preacher ought to wear the surplice rather than the gown in the morning service, raised a storm of religious controversy and excited feeling upon which a sober-minded man now looks back with surprise and regret. And I cannot but agree with his biographer, that "it will hardly be denied, that the great principle for which Bishop Blomfield contended, that in divine service all things should be done *decently*, but *in order*, is now acted upon in the Church of England to an extent, which, twenty years ago, would hardly have been expected by men of calm judgment, and which, thirty years ago, would by most have been pronounced impossible." (1)

The same canons enjoined the use of copes in cathedrals (canon 24), a special prayer called the bidding prayer to be used by all ministers before every sermon (canon 55), a passing bell to be tolled for every dying parishioner (canon 67); that "upon every Sunday or holyday" the minister shall "under pain of suspension and excommunication, for half an hour or more, examine and instruct the youth and ignorant persons in his parish in the

(1) Memoirs of Bishop Blomfield, vol. ii. p. 64.



Ten Commandments, the Articles of the Belief, and in the Lord's Prayer; and shall diligently hear, instruct, and teach them the Catechism set forth in the Book of Common Prayer" (canon 59): that a particular dress, minutely specified, shall be worn by ecclesiastical persons on a journey (canon 74); that the Litany shall be said or sung wherever appointed by the prayer-book, more particularly upon Wednesdays and Fridays, though they be not holy-days (canon 15).

The rubric directs that the holy elements shall be placed upon the table of the Lord at a particular part of the service; but till lately, and before the decision of the Privy Council in favour of the use of the credence table, this rubric was generally disobeyed. The rubric is express in its directions, that "unless the minister be otherwise reasonably hindered," he shall perform daily service; that "the feasts shall be observed," in which category are included all Sundays, and certain feasts and saints' days; and there is also a careful table of the vigils, fasts, and days of abstinence to be observed throughout the year; that "so many as intend to be partakers of the holy communion shall signify their names to the curate at least some time the day before." Private baptism, which was only to be allowed for "great cause or necessity," had so generally superseded public baptism, that the late Bishop of London was compelled expressly to forbid his clergy to baptize privately except in cases of necessity; and, indeed, of all these precise orders, of which the catalogue is not exhausted, having for their object the spiritual edification of members of the Church, how very few, till lately, within our own memory, have been obeyed, and how much more common has been the breach than the observance of them.

It is true that Mr. Mackonochie is not charged with any disobedience to the law in these respects; his offence is that of unauthorized addition, of doing too much and not too little in his ministrations in the Church; but I refer to this notorious fact of general disobedience to the law in these respects, because a revived obedience to it, not unnaturally, excites the surprise and sometimes the anger of persons who have been habituated to a more relaxed and less careful system. A compliance with the law has the effect of novelty upon them, and they are apt to consider as

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illegal not the desuetude of a prescribed usage, but the restoration of it.

This argument of disuse was most strongly urged in the Knights-bridge Church cases as conclusive against the cross and the credence table; and it was truly said that the instances in which any trace of them could be substantiated by evidence, since the Reformation, were very few and inconsiderable,—not half a dozen, I believe, in number; and it was contended that such disuse amounted to a practical rejection of them by the Church. And this argument prevailed with the judges of the Consistory of London and of the Arches Court, who accordingly pronounced these things to be unlawful. But it did not avail before the Judicial Committee of the Privy Council, who, looking to their innocent and primitive use, reversed the sentence of these courts, and pronounced them to be lawful.

The mere fact, therefore, that the practice complained of is novel, furnishes by no means an irrefragable argument that it is unlawful, and it can afford, in truth, but little assistance in solving the question whether the practices charged against Mr. Mackonochie are or are not contrary to the law.

In the second place, the alleged disuse or desuetude must be measured by a reference to the history of the institution during the period in which it has prevailed. The questions—has that institution been during this period in its normal condition? has it been in a state of unconstrained freedom? of undisturbed liberty of action? or has it during this period been from time to time turned aside from its natural course? has it been oscillating between peril and disquiet and the apathy which is so often their reactionary successor? has it manifested, wherever it has been in a state of freedom, peace, and vigour, a desire to restore and reserve as much as it could of a lawful inheritance which had been forcibly put in abeyance, and had that desire and endeavour always accompanied a revival of life and energy? These are questions which must be answered before the argument for disuse can be properly estimated. A careful examination of the history of this country, and more especially of that part of it which relates to the Church, affords some explanation of the careless and imperfect compliance with the directions and orders of the prayer-book

to which I have adverted. To enter at length into this history would far exceed the limits of my present judgment, but I will make a very cursory reference to the principal epochs.

From the reign of Edward VI. to the reign of her present Majesty the intervals during which the Church has been undisturbed by troubles from within or without have been few.

During the short reign of Edward VI. she underwent various trials. Her worship and her ritual were twice dealt with by parliament, and not only her revenues, but the ornaments and treasures within her fabrics were scandalously plundered in order to fill the purses of the corrupt courtiers of a precocious, well-meaning, but prejudiced and narrow-minded boy, who, during the few years of his reign, was little more than an instrument in the unscrupulous hands of the religious and political factions which surrounded and besieged his throne.

I will borrow the language of Fuller, in his "Church History of Britain," (Book vii. p. 401).

Speaking of the year 1549, this quaint but faithful historian says—

"Come we now to the saddest difference that ever happened in the Church of England, if we consider either the time how long it continued, the eminent persons therein engaged, or the dolefull effects thereby produced. It was about matters of conformity. Alas! that men should have lesse wisdom than locusts; which when sent on God's errand, 'did not thrust one another' (1), whereas here such shoving, and shouldring, and hoising, and heavings, and justleing, and thronging, betwixt Clergie-men of the highest parts and places. For now non-conformity in the daies of King Edward was conceived, which afterward in the reign of Queen Mary (but beyond sea at Frankford) was born, which in the reign of Queen Elizabeth was nursed and weaned, which under King James grew up a young youth, or tall stripling, but towards the end of King Charles his reign, shot up to the full strength and stature of a man, able, not only to coap with, but conquer the hierarchie its adversary."

Speaking of the year 1552, the same historian says (Book vii. p. 417)—

"Lately information was given to the King's councill, that

(1) Joel ii. 8.

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much costly furniture, which was embezzled, might very seasonably (such the King's present occasions) and profitably be recovered. For private men's halls were hung with altar-cloathes, their tables and beds covered with copes, instead of carpets and coverlets. Many drank at their daily meals in chalices, and no wonder if it came to the share of their horses to be watered in rich coffins of marble. And, as if first laying of hands upon them were sufficient title unto them, seizing on them was generally the price they had payed for them. Now although four years were elapsed since the destruction of colleges and chantries, and much of the best church ornaments was transported beyond the seas, yet the Privie Council thought this very gleaning in the stubble, would richly be worth the while, and that, on strict inquisition, they should retrieve much plate in specie and more money for moderate fines on offenders therein. Besides, whereas parish churches had still many rich ornaments left in the custody of their wardens, they resolved to convert what was superfluous or superstitious to the king's use. To which purpose commissions were issued out to some select persons in every county," &c.

It was probably a like spirit of avarice which, using the honest fanaticism of the Geneva divines as its instrument, dictated the destruction of all the ancient service books as well as images, by the Order in Council of December 24, 1549, and the 3 & 4 Edw. 6, c. 10.

The bindings and cases of these books of devotion were often studded with gems and of great value; and the images from their costly material, as well as their careful execution, offered a tempting prey to the spoiler.

During the succeeding reign of Mary, the Church was altogether driven from her sanctuary. Elizabeth, indeed, exerted the great sagacity which she possessed in laying deep and wide the foundations of the establishment to which the church was restored. But the foreign element which the persecutions of Mary had much increased, began to ferment, and to wage a ceaseless war with the principles upon which the Church had been reformed, and though the masculine sense and vigorous hand of this great Queen restrained the attacks of the innovators from Geneva and Germany, she was obliged to tolerate a practical laxity in all that related to



the ritual of the Church, in order to secure the maintenance of the Catholic doctrine.

It cannot be doubted, from her resolute retention of the ornaments of her chapel, including lights and a crucifix, from her avowed belief in the real presence, as well as from her language and conduct, that her desire and intention were to embrace the Lutheran and the Romanist within the wide and liberal pale of the National Church. (1)

And I may observe in passing, that it was in the same spirit of liberality and comprehensiveness that our bishops in 1661, said, "It was the wisdom of our reformers to draw up such a liturgie as neither Romanist nor Protestant could justly except against; and therefore, as the first never charged it with any positive errors, but only the want of something they conceived necessary, so it was never found fault with by those to whom the name of Protestants most properly belongs, those that profess the Augustine confession; and for those who unlawfully and sinfully brought it into dislike with some people, to urge the present state of affairs as an argument why the book should be altered to give them satisfaction, and so that they should take advantage of their own unwarrantable acts, is not reasonable." (2)

Bishop Sandys writes to Archbishop Parker: "The last book of service is gone through with a proviso to retain the ornaments which were used in the first and second year of King Edward until it please the Queen to take further order for these. Our gloss upon this text is that we shall not be forced to use them, but that others in the meantime shall not convey them away, but that they may remain for the Queen." (3)

The Puritans rejected with scorn the toleration which the Queen and Walsingham, with a rare wisdom unknown to their age, were ready to extend to them. Bishop Madox cites a declaration of this party as follows:—

"As for you dear brethren, whom God hath called into the

(1) The rubric, commonly called the black rubric, after the communion, in the second prayer-book of Edward VI., explained that no adoration was due to the *real* and essential presence. Elizabeth struck it out. The rubric reappears in the last prayer-book with

the very material alteration of "or unto any *corporal* presence of Christ's natural flesh or blood."

(2) Lathbury's History of the Book of Common Prayer, chap. xiii. p. 324.

(3) Strype Ann. vol. i. part i. p. 122; Burnet, vol. ii. part ii. p. 457 (ed. 1816).

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brunte of the battle, the Lord keep you constant, that ye yield neither to toleration, neither to any other subtil persuasions of dispensations or licences, which were to fortify their Romish practices; but as you fight the Lord's fight, be valiant. The matter is not so small as the world doth take it; it will appear, before all be ended, what an hard thing it is to cut off the rags of the Hydra of Rome. Let us not make the heritage of God as a bird of many colours, holding of divers religions; but rather let us take away, if we can, the names, memories, and all monuments of Popery." The Bishop goes on to say, "Who were meant by this description in the year 1570, needs no explanation. The bishops and clergy of the Church of England were then constantly represented as bearing the names and supporting the monuments of popery. Agreeably to this exhortation of yielding to no toleration, nor accepting any indulgence, in all their petitions, admonitions, supplications, etc., we see nothing of a toleration for themselves only, but their single request or command, in whichever style they speak, is, the absolute overthrow of the established government and worship, and the introduction of their own with penalties, even sharp punishments to be inflicted upon those who did not comply with it." (1)

In 1597, Hooker wrote the fifth book of his Ecclesiastical Polity, in which he vindicated the rites and ceremonies of the Church of England against the attacks of the Puritans, and pointed out, with a prophetic spirit, the confusion which would ensue "if it should be free for men to reprove, to disgrace, to reject, at their own liberty, what they see done and practised according to order set down." (2)

In the reign of Elizabeth's successor, the Hampton Court Conference, and the Canons of 1603, aided by the disposition of James, and the great power of his prerogative, which then rested on the Statute of Elizabeth, and the general tranquillity of the country, enabled the Church to put in force, in some degree at least, the provisions of her ritual.

The leaven of the Puritans, however, was at work, and is well illustrated by the language which they held respecting our prayer-book at this time. I refer again to Bishop Madox (p. 73):—

"But Mr. Neale tells us, it would have obviated many objections,

(1) A Vindication of the Government, &c., of the Church of England, pp. 287-289.

(2) Eccl. Polity, book v. chap. 10.

if the committee had thrown aside the mass book, and composed an uniform service in the language of Scripture." This was an objection frequently made by the Puritans, with great variety of very severe and very coarse expressions. Thus, in their first admonition to the parliament, "Remove (say they, in great warmth) homilies, articles, injunctions, and that prescript order of service made out of the mass book." In their second admonition to the parliament, they express themselves after this manner: "We must needs say as followeth, that this book is an imperfect book, culled and picked out of that popish dunghill, the portuise and mass book, full of all abominations." Another of them is pleased to deliver his opinion in the following words: "The whole form of the Church Service is borrowed from the Papists, pieced and patched, without reason or order of edification." Their famous leader, Mr. Cartwright, likewise declares his and his brethren's displeasure upon this head: "Before I come to speak of prayers (says he) I will treat of the faults that are committed almost throughout the whole liturgy and service of the Church of England, whereof one is that which is often objected by the authors of the admonition, that the form of it is taken from the church of antichrist."

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During the early part of the reign of Charles I. the advance in ritual restoration was rapid, and was accompanied by great imprudence and little knowledge of, or attention to, the actual circumstances of the state. The Puritan religious element allied itself with the political element; and so it came to pass that a literal and strictly legal compliance with the rubric formed no insignificant part of the impeachment which brought about the judicial murder of Archbishop Laud, one of the most distinguished writers against the pretensions of the papacy. (1)

(1) Whitelock. (Memorials of the English Affairs. Folio. Tonson, 1732.)

Anno 1643, p. 75.—The commons "ordered copes and surplices to be taken away out of all churches."

Anno 1644, p. 88.—Laud on his trial; objected to him "that he caused superstitious pictures, images, and crucifixes to be set up in many churches, and in the King's chapel caused a popish crucifix to be hung up over the

altar upon every Good Friday, which had not been there before since the reign of Queen Mary. . . . and his consecrating of churches, tapers and candlesticks, organs, and particular prayers for those purposes."

The commons "ordered the taking away of all such pictures, images, and crucifixes in the King's chapel at Whitehall."

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Then was the wisdom, as well as the piety, of the principles upon which our church was reformed demonstrated. In Protestant Germany and in Geneva, where the apostolical order and primitive usages had been, from whatever causes, neglected or abandoned, and in this kingdom, during the troubles of the civil wars, almost every variety of sect which the vanity, presumption, and ignorance of man, under the influence of unchecked religious excitement could devise, sprang into existence.

All these who acted

“As if religion were intended  
For nothing else but to be mended,” (1)

and whom the poem of Butler has rescued from oblivion, have furnished to Rome her strongest weapon for the defence of abuses equally without warrant from Scripture and tradition, and for attack upon the purer branches of the Catholic church.

At the restoration, the Church, with the full and hearty consent of the people, restored, with few exceptions, the primitive ritual, of which Cranmer and Ridley, the chiefs of a noble army of martyrs, had approved.

But the impoverished condition of the clergy, the dilapidated state of the desecrated churches, the profligacy (a reaction from Puritanism) and poverty of the landowners, combined to prevent that moderate amount of ritual development which a strict obedience to the direction of the rubric required.

Lord Macaulay's picture of the miserable status of the parochial clergy during the 17th century (2) is probably painted in too dark colours; but there is no doubt that it was one highly unfavourable to ritual ornament either in the dress of the priest or in the furniture of the church.

desired a treaty, which was admitted, and he demanded to march away with bag and baggage, &c., and that all within the town should have liberty of conscience, the prebends to enjoy their places, to have common prayer, organs, copes, surplices, hoods, crosses, &c.

“These things were denied by the parliament, &c.” This was at York, June, 1644.

“August, 1644, p. 98.—Col. Middleton sent up to the parliament from Sarum many copes, surplices, tippets, hoods, plate, and the picture of the Virgin Mary, taken in the minster there; other relics being divided among the soldiers.”

(1) Hudibras, part i., canto l., 205, 206.

(2) History of England, vol. i. p. 327.



It was seldom that men connected with noble families entered into holy orders, and the adoption of that profession by Herbert was a remarkable phenomenon of the time.

Then came the struggle of James II. to reimpose the yoke of Rome upon the liberties of our church.

The very learned Cave, in his Epistle Dedicatory to the History of the Fathers of the Church in 1683, observes:—

“The Church of England, incomparably the best part of the Catholic church at this day visible upon earth, is miserably torn in pieces, hated, and maligned; secretly undermined by enemies from abroad, and openly assaulted by pretended friends at home. *Altar* is erected against *altar*, and private congregations kept up in opposition to the publick constitution. The liturgy and forms of divine administration derided, odiously traduced, and run down with nothing but noise and clamour. The rites and institutions, though the same that were used in the primitive ages of Christianity, derided as anti-Christian. The discipline and authority weakened, and, by the obstinacy and perverseness of men, made ineffectual.”

The great defection of the non-jurors, who were much attached to ritual observances, among whom were some of the most pious and learned prelates of the realm, at the beginning of William III.'s reign, must, I think, have been unfavourable to ritual observances in the Church establishment which they had left. (1)

As we enter on the 18th century we trace the gradual increase of disobedience to all directions of the Church which had for their object not merely the ornament, but the decency of divine worship.

In 1710 good Bishop Fleetwood, in his charge to his clergy,

(1) Mr. Hallam observes: “Eight bishops, including the primate and several of those who had been foremost in the defence of the Church during the late reign, with about four hundred of the clergy, some of them highly distinguished, chose the more honourable course of refusing the new oaths: and thus began the schism of the non-jurors, more mischievous in its commencement than its continuance, and not so dangerous to the government of

William III. and George I. as the false submission of less sincere men.” Having alleged reasons in favour of the imposition of the oath, he adds in a note: “Yet the effect of this expulsion was highly unfavourable to the new government, and it required all the influence of a latitudinarian school of divinity, led by Locke, which was very strong among the laity under William, to counteract it.”—Constit. Hist., vol. iii. p. 108, 7th ed.

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observed: "That unless the good public spirit of building, repairing, and adorning churches prevails a great deal more among us, and be more encouraged, a hundred years will bring to the ground a huge number of our churches."

During the reigns of the first two Georges, and the beginning of the third, a decay of piety and learning, with brilliant exceptions indeed, went hand in hand with slovenliness of ritual and habitual indifference to rubrical injunctions upon this subject; and in 1751, that is forty years afterwards, not many months before his death, that great prelate, Bishop Butler, whose "Divine Philosophy" has charmed educated men of all creeds, referring to these words of Bishop Fleetwood, uttered this lamentation: "This excellent prelate made this observation forty years ago; and no one, I believe, will imagine that the good spirit he has recommended prevails more at present than it did then."

In another part of the same charge he says: "Nor does the want of religion in the generality of the common people appear owing to a speculative disbelief or denial of it, but chiefly owing to thoughtlessness and the common temptations of life. Your chief business, therefore, is to endeavour to beget a practical sense of it upon their hearts as what they acknowledge their belief of, and profess they ought to conform themselves to. And this is to be done by keeping up, as we are able, the form and face of religion with decency and reverence, and in such a degree as to bring the thoughts of religion often to their minds, and then endeavour to make this form more and more subservient to promote the reality and power of it. The form of religion may indeed be where there is little of the thing itself, but the thing itself cannot be preserved amongst mankind without the form.

"That which men have accounted religion in the several countries of the world, generally speaking, has had a great and conspicuous part in all public appearances, and the face of it has been kept up with great reverence throughout all ranks, from the highest to the lowest; not only upon occasional solemnities, but also in the daily course of behaviour. In the heathen world, their superstition was the chief subject of statuary, sculpture, painting, and poetry. It mixed itself with business, civil forms, diversions, domestic entertainments, and every part of common life. The

Mahometans are obliged to short devotions five times between morning and evening. In Roman Catholic countries people cannot pass a day without having religion recalled to their thoughts, by some or other memorial of it, by some ceremony of public religious form occurring on their way; beside their frequent holidays, the short prayers they are daily called to, and the occasional devotions enjoined by their confessors. By these means their superstition sinks deep into the minds of the people, and their religion also into the minds of such among them as are serious and well disposed. Our reformers, considering that some of these observances were in themselves wrong and superstitious, and others of them made subservient to the purposes of superstition, abolished them, reduced their form of religion to great simplicity, and enjoined no more particular rules, nor left anything more of what was external in religion, than what was in a manner necessary to preserve a sense of religion itself upon the minds of the people. But a great part of this is neglected by the generality amongst us; for instance, the service of the Church, not only upon common days, but also upon Saints' days, and several other things, might be mentioned. Thus they have no customary admonition, no public call to recollect the thoughts of God and religion from one Sunday to another.

"Indeed, in most ages of the Church the care of reasonable men has been, as there has been for the most part occasion, to draw the people off from laying too great weight upon external things, upon formal acts of piety. But the state of matters is quite changed now with us. These things are neglected to a degree which is and cannot but be attended with a decay of all that is good. It is highly seasonable now to instruct the people in the importance of external religion.

"And doubtless under this head must come into consideration a proper regard to the structures which are consecrated to the service of God. In the present turn of the age one may observe a wonderful frugality in everything which has respect to religion, and extravagance in everything else. But amidst the appearance of opulence and improvement in all common things, which are now seen in most places, it would be hard to find a reason why these monuments of ancient piety should not be preserved in their

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original beauty and magnificence. But in the least opulent places they must be preserved in becoming repair, and everything relating to the divine service be, however, decent and clean, otherwise we shall vilify the face of religion, whilst we keep it up. All this is, indeed, principally the duty of others; yours is to press strongly upon them what is their duty in this respect, and admonish them of it often, if they are negligent.” (1)

Then followed the great schism of which the pious Wesley was unwillingly and unwittingly the leader, but of which the apathy and sloth of the Church was the true cause. A resuscitation of Christian life was afterwards brought about by a school in the Church which, though with little knowledge of or care for ecclesiastical traditions or primitive usage, yet almost within the memory of the present generation represented the earnestness and energy of the establishment. Both these events were unfavourable to the maintenance of ritual observances.

The piety of this school is not incompatible with superior erudition and historical knowledge in persons more susceptible to the influences of external rites and ceremonies. A school has sprung up in our memory, which, having first restored the true ecclesiastical architecture in our churches, proceeded to inquire into the real meaning of the rubrical directions in our prayer-book, examined them by the light of history and tradition, and arrived at the conclusion that a bare and unattractive service, sordid furniture, and the absence of all that was beautiful in art in the temple of God, was not a necessary condition of a Church which had thrown off the corruptions and novelties of Rome. The prayer-book referred them to the custom and usage which prevailed in the second year of Edward the Sixth. In the Lutheran and Swedish services they found crucifixes, incense, lighted candles, and gorgeous dresses. They thought it obvious, therefore, that no necessary connexion subsisted between these ornaments and usages of primitive antiquity, and the mediæval and false claims of the papacy.

Recognizing the spirit of this movement in the Church, the late Bishop of London, in his charge in 1842, used this emphatic language:—

“Every clergyman is bound by the plainest obligations of duty

(1) Bishop Butler’s Works, vol. ii. pp. 315, 317.



to obey the directions of the rubric. For conforming to them, in every particular, he needs no other authority than that of the rubric itself. We ought not to be deterred from a scrupulous observance of the rights and customs prescribed or sanctioned by our church by a dread of being thought too careful about the externals of religion. If we are not to go *beyond* her ritual, at least we ought not to fall *short* of it; nor to make her public services less frequent, nor more naked and inexpressive, than she intends them to be."

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Again he says:—

"An honest endeavour to carry out the Church's intentions, in every part of public worship, ought not to be stigmatized as Popish or superstitious. If it be singular, it is such a singularity as should be cured, not by *one* person's desisting from it, but by *all* taking it up. When I have been asked, whether I approved of certain changes in the mode of celebrating Divine service, which were spoken of as novelties, but which were in fact nothing more than a return to the anciently established order of the Church, my answer has been, far from questioning the *right* of the clergy to observe the rubric in every particular, I know it to be their *duty*; and the only doubt is, how far are we justified in not *enforcing* such observance in every instance." (1)

Bishop Stanley, in his charge in 1845, says, "Speaking of the decorations of churches, I am aware of the reply; they pander, it is said, to idolatry, and may again become the object of superstitious worship. In a former age, when the minds of men were under the control of a superstitious and designing priesthood, such reasoning might have weight, but I must confess I cannot now hear it without mingled sentiments of pain and surprise." . . . "We need not," he concludes, "like the Puritans of old, banish the influence of art from the sphere of religion, and return to that rude spirit which went forth as the destroyer of all that was beautiful, glorying in its barbarous mutilations."

I will conclude my observations on this subject in the words of the oldest and certainly not the least able and learned of our prelates. In 1851 the Bishop of Exeter said (from Appendix A. to the report of the Ritual Commission, page 122), "Let me make

(1) Bishop of London's Charge in 1842, pp. 30, 31.

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one general remark. Where the congregation consists mainly of the poorest orders, there we commonly observe a great love of a majestic and even elaborate service. The ornaments of their church; the storied glass; the painted, and it may be gilded, walls; the table of the Lord elevated above the rest, and decked with sober yet costly furniture; the pealing organ; the chanted psalms; the surpliced choristers; the solemnity of the whole ritual—gladdens, while it elevates their minds; they recognize in it their own high privilege as Christians, and rejoice to find themselves equal participants with their richest neighbours in the homage thus paid to the common Lord and Father of all. In truth, when we consider the little which the poor man has to delight his heart and touch his imagination in his own squalid home, we ought to rejoice that he can find enjoyment in the house of prayer, his Father's house. For this reason few occurrences have affected me more than the lamentations of the poor worshippers, in one of the districts of the metropolis, when they saw, or thought they saw, at the dictation of a riotous and lawless mob of strangers, the approaching surrender of the ritual which they loved, and which was their weekly, to many among them the daily, solace of that poverty to which the providence of God had consigned them."

It was in this spirit that the church of St. Albans was, we know, built. In this spirit we must all hope that its services have been conducted. But it remains to be seen whether they have or have not gone beyond those bounds of ritual observance which the law of our church has set.

General Principles for the Construction of Rubrics.

In the foregoing observations I have dealt with two heads of the arguments urged by the counsel for the promoter, which for the sake of clearness I will repeat; namely,—

That these particular practices are by necessary implication prohibited, inasmuch as they are connected with Roman or Popish doctrines.

And that as such as they have, as a matter of fact, been disused ever since the Reformation.

I am of opinion that neither of these arguments can avail to prove that the practices complained of are illegal. I have now to consider the two other heads of their argument, namely,—

That, as by these practices a new rite or ceremony has been added to those which are prescribed by the Statutes of Uniformity, such practices are unlawful.

And that these particular additions are expressly prohibited.

The due consideration of these arguments renders it expedient that I should previously determine upon what principles the rubrical directions of the prayer-book should be construed.

It has been argued on the one side that the legal effect of express directions in the rubric is to shut out every right, ceremony, utensil, or ornament which is not the subject of such express provision, or by necessary implication directly subsidiary to it. It has been argued, on the other side, that every ancient Catholic rite, ceremony, utensil, or ornament which is not the subject of an express prohibition is lawful. I am not disposed to assent to either of these propositions in their full latitude.

I believe the following rules to be well founded in principle, reason, and law, and I shall endeavour to guide myself by them: namely, that what is expressly prohibited is prohibited altogether, and may not be evaded by any contrivance which, under a different name or appearance, attains the same end; and whatever is expressly ordered may not be evaded by an illusory or partial compliance; that whatever is subsidiary to what is ordered, and whatever being in itself decent and proper in accordance with primitive and catholic use, and which is not by any fair construction necessarily connected with those Roman novelties which the Church "cut away and clean rejected" (to use the language of the prayer-book) at the Reformation, is, under restrictions to be mentioned, lawful.

There are, in other words, three categories of these things:—

- (1.) Things lawful and ordered.
- (2.) Things unlawful and prohibited.
- (3.) Things neither ordered nor prohibited expressly, or by implication, but the doing or use of which must be governed by the living discretion of some person in authority.

I wish to say a word first upon this last category.

The compilers of our prayer-book, and the legislature which clothed it with the authority of a statute, were well aware that such a living discretion was indispensably necessary for the government

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of the Church in the performance of her Divine service, as well as in the due discharge of her other functions.

In the preface concerning the service of the Church, it is stated that "nothing can be so plainly set forth but doubts may arise in the use and practice of the same;" accordingly the first and every subsequent prayer-book, including the present one, provided what must have been intended and believed to be a sufficient remedy for the evil which was thus contemplated as of possible, perhaps probable occurrence.

It is important to notice the nature and character of the remedy proposed. It was one in perfect accordance with the principle upon which the order and discipline of the Church had, in obedience to the will of Christ, been founded by his apostles; a principle which recognized the apostolical order of bishops as necessary for the due constitution of the Church; and in perfect accordance with the great principle of the Reformation of the Church of England, that a duly consecrated bishop had a Divine authority, perfect and complete in itself, and wholly independent of the previous consent or subsequent ratification of that authority by the Pope.

The remedy was as follows:—"To appease all such diversity (if any arise), and for the resolution of all doubts concerning the manner how to understand, do, and execute the things contained in this book, the parties that so doubt or diversely take anything shall alway resort to the bishop of the diocese, who by his discretion shall take order for the quieting and appeasing of the same, so that the same order be not contrary to anything contained in this book, and if the bishop of the diocese be in doubt, then he may send for the resolution thereof to the archbishop."

The words of this order deserve the closest attention; it provides "for the resolution of all doubts concerning the manner how to understand, do, and execute the things contained in this book;" terms which certainly appear to comprehend every conceivable difficulty or doubt which could possibly arise. The authority which is to resolve these doubts and remove these difficulties, is that officer in whose hands, previously to the statutory enactment of any prayer-book, the Church had placed a supreme command over all that relates to her ritual. "The parties that so doubt or diversely take anything shall always resort to the bishop of the



diocese." The mode of resolution is not stated, but the language is such as to render it improbable that any formal proceedings in a court were contemplated. "The bishop by his discretion shall take order for the quieting or appeasing of the same,"—large, and, I think, wise expressions, making reference to a living authority, such as the nature of the thing seems to demand, and the Church had always recognized as having the power to deal with the circumstances of each case as they arose. Was there any limitation to this authority? One only, it appears; that his order "shall not be *contrary* to anything contained in this book;" leaving therefore, in my judgment, within the domain of his authority that third category to which I have referred, namely, "things neither ordered nor prohibited expressly or by implication."

Was there any provision for controlling the exercise of this discretion?—Yes, a provision not inserted it is true in the first prayer-book, but equally in accordance with the discipline of the Catholic Church and with the denial of papal pretension; the provision "that if the bishop be in doubt he may send for the resolution thereof to the archbishop."

Some construction must be placed upon this order. There are but three possible constructions which occur to my mind: one, that the order merely means that the minister or "party" may quiet his own conscience by having recourse to the private advice of the ordinary, which advice, when given, he is conscientiously bound to follow; a second construction is, that the order contemplates formal proceedings in the ecclesiastical courts of the diocese and the province; the third is, that which I have suggested.

It is certainly remarkable that as far as I am aware this order has never yet received any judicial interpretation. I remember very well arguing before a very learned ecclesiastical judge, Sir Herbert Jenner Fust, in the *Stone Altar Case* (it was brought into the Court of Arches by appeal from the sentence of the Court of Ely, which Court had affirmed the legality of the stone altar), that the question was one to be decided according to the discretion of the ordinary, according to this order; and, in his judgment, Sir H. J. Fust said, "After much consideration now given, I am of opinion the matter is *not* one of discretion but of law. Were it otherwise I should be desirous of consulting the wish of the

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parish." (1) It was clearly, therefore, the opinion of Sir H. J. Fust, who was perfectly conversant with ecclesiastical law and practice, that this order was not to be treated as a dead letter, although, after much reflection, he was of opinion the questions as to the material and position of the altar-table did not come within its purview. The structure of a stone altar he conceived to be "contrary" to the provisions of the prayer-book. And in *Westerton v. Liddell*, the Lords of the Privy Council, after deciding that it was lawful to place upon the holy table cloths of various colours, observed, "Whether the cloths so used are suitable or not, is a matter to be left to the discretion of the ordinary." (2)

There is a difficulty arising out of this construction, from the consideration of which I must not shrink. It may be said that the bishop, when he had taken order for appeasing the doubt, would have no legal means of enforcing that order, and that for the purpose of such enforcement he must have recourse to his court. But it appears to me that, on the supposition that the matter was one on which he could exercise his discretion, he could clothe his order with the character of a monition, and that a disobedience to such monition would subject the person disobeying to the penalties of contumacy.

I should observe that the canon law unquestionably placed in the hands of the bishop the authority to govern all questions of ritual.

"Et quidem," (Van Espen says) "quia dispares diversarum nationum mores et ingenia diversos ritus et cæremonias, ut in politicis ita et in ecclesiasticis exigunt, hinc in ritibus magna ecclesiarum varietas; præsertim quia nullo extante de his Christi vel Apostolorum præcepto, libera potestas episcopis relicta erat, id sentiendi et decernendi quod unicuique salvâ fide magis expediens videbatur."

And citing the decree of a synod he says: "Novæ cæremoniæ nullæ in ecclesiis recipiantur sine episcopi judicio." (3)

Upon this construction of this rubrical order, it will be my duty to consider whether any of the charges preferred against Mr. Mackonochie ought to have been dealt with by the discretion of

(1) 1 Rob. Ecc. 255.

(2) Moore's report of the case,  
p. 188.

(3) Jus Eccles. Universum, pars 2,  
tit. 5, cap. 2, ss. 15, 24, tom. i. pp  
411, 412.

the ordinary, and not to have been made the subject of a criminal proceeding against him in this or in any other court.

With respect to the two other categories of rubrics, namely, those which relate to things lawful and ordered, and things unlawful and prohibited, there is a question in limine which must be considered. Is there a *common law* of the Church unwritten, living by usage, though partly expressed, perhaps, by judicial decisions; but still more, to use a common expression, taken for granted by all authorities in Church and State—filling up the void of positive provision in statute or formulary—a necessary part of an organized religious system and establishment, rendering the practical working of it possible, and, on the whole, harmonious?

That there has been such a usage in the Church at large, from its earliest foundation, is certain. "We know no such customs, neither we nor the churches of God," was the language which we learn from inspired authority she used as her shield against the earliest assaults upon her integrity. "Let the ancient customs prevail" was the maxim, fatal to the medieval and modern pretensions of Rome, which the Church enunciated in her earliest œcumenical council. The canon law of the western church fully recognizes custom and usages as a distinct source of ecclesiastical jurisprudence. Was the branch of this church, which the constitution and the legislature have established in this kingdom, devoid of this subsidiary aid to her discipline and government?

In the case of *Wilson v. McMath* (1) a very curious question was raised, whether the minister, as such, has a right to preside at a vestry meeting.

Sir John Nicholl, the official principal of the Archbishop of Canterbury, observed, at p. 78: "The case is said to be a new one, so far as regards any *express* law, or any judicial decision on the subject. There is no statute, no canon, no reported judgment, either *expressly* affirming, or *expressly* negating the right. It nevertheless may exist as a part of the common law of the land, as a part of the *lex non scripta*, which is of binding authority, as much in the ecclesiastical as in the temporal courts. Indeed, the whole canon law rests for its authority in this country upon received

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usage; it is not binding here *proprio vigore*. Moreover, this court upon many points is governed, in the absence of express statute or canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*."

"It is true that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means: it may be proved by public notoriety, or be deducible from principles, and analogy, or be shewn by legislative recognitions. Published reports of the decisions of the ecclesiastical courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before." Upon this principle, in the time of James I., the King's Bench refused to prohibit the ordinary from compelling a woman to be churched in a veil, because it was certified by divers bishops to be the common custom of the Church of England. (1)

There is, therefore, a common law of the Church which runs by the side of the statute law, and which must assist in the construction of it.

It is often said that a rubric should be construed on the same principles as an act of parliament; but admitting this to be so, it is obvious that there are peculiar difficulties incident to the construction of a rubric which seldom, or in a much less degree, beset the construction of an ordinary statute. And it will appear from what has been already said, that the right understanding of the rules supplied by the rubric for the regulation of the services may often require a reference to the sources not only of historical, but to a certain extent theological knowledge.

There is one important rule applicable to the construction of all instruments, namely, that the construer should endeavour to place himself in the position of the framer of the instrument, and to gather from all the circumstances which surrounded him at the time when he framed it, and from the context of other portions of the instrument, what the real meaning and intention was, if the language which he has used have left that meaning and intention doubtful or obscure.

(1) Vin. Abr. xvii. p. 231, tit. "Pre- Power of the Ordinary;" 1 Burns' Eccl. Law, ed. Phill. p. 318.  
rogative of the King," "Ordinary and



In the case of *Escott v. Mastin* (1), in which a question as to the lawfulness of baptism, administered by a layman with water and the invocation of the Trinity, was mooted, the Lords of the Privy Council observed as follows, p. 123 :—

“The 68th canon being that upon which this proceeding is grounded, it is necessary to consider what the law was at the date of the canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the rubric of 1661, adopted into the 13th and 14th Charles II. cap. 4, made, and in what state it left the law on this head; because it is very possible that the same enactment of a statute, or the same direction in a rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the common law that comes in question, as well as the statute. . . .

“The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new rubric of 1661, there is nothing in that rubric to invalidate it. Generally speaking, where anything is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old, else both will be understood to stand together if they may. But, more especially, where the common law is to be changed—and, most especially, the common law which a statutory provision had recognized and enforced—the intention of any new enactment to abrogate it must be plain to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place between affirmative and negative words, giving more effect to the latter (2), has sometimes been denied, at least doubted (*Lovelace's Case* (3), before the

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(1) 4 Moo. P. C. 104, 123, 130.

(2) Co. Lit. 115, a.

(3) W. Jones, p. 270.

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Windsor Forest Court, in 1632, in which there is a dictum of Lord Chief Justice Richardson), Mr. Hargrave thinks upon a misapprehension (Note 154). But the rule which is laid down in 2nd Inst., 200, has been adopted by all the authorities, that 'a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.' So Comyn's Digest, Parliament, R. 23; and he cites the case *De Jure Ecclesiastico* (1), which lays down the rule in terms."

Let me apply this rule to the subject before me. The first prayer-book of Edward VI. contains only one prohibition, the elevation of the blessed sacrament; but it contains various directions respecting the articles to be used in the administration of the holy communion. It has been pointed out that the enumeration of these articles could not be exhaustive, inasmuch as the indispensable article of "a fair linen cloth" is omitted from it.

The argument is, I think, valid; the officiating priest must have supplied this article, and the legislature must have intended him to supply it.

He must have looked to an unwritten *use*, the foundation of a common law for the Church, not less than for the State.

Just as much as it must have intended by the rubric in our present prayer-book: "The priest shall then place upon the table so much bread and wine as he shall think sufficient," that there should be a table or place from which the elements should be then brought; and therefore the Judicial Committee of the Privy Council, reversing the sentence of the Consistory of London and the Court of Arches, decided that the credence table, which supplied this want, was a lawful ornament. Those who compiled the first prayer-book of Edward VI. were not inventing a ritual for the first time, but were constructing one from the various service books, some English and some foreign, which they had before them. This ritual was to be placed in the hands of persons conversant with the older service books; and it seems highly unreasonable to suppose that it was not competent to the priest to supply any accidental omission in the new ritual by a reference to the previously existing usage and practice. In the same way, in the Sarum missal no

mention is to be found of the two lights to be placed upon the altar, but there is no doubt that the constitution which ordered these two lights was legally binding upon, and must have been a part of the furniture of, those churches which adopted the use of Sarum, at least in the province of Canterbury. Another illustration is furnished by the very remarkable fact that the second prayer-book of Edward VI. omitted all reference to the manual acts, ordered in the first and last prayer-books, attending the consecration of the holy elements; and that during the whole period which elapsed between the date of the second prayer-book in 1552 and that of the present prayer-book in 1661, the officiating priest was left without any direction upon this subject in the prayer-book which he was to use. Now, one of two consequences must follow: either the cup was never taken in the hand, the bread never broken, as at present, or these manual acts were done without any specific order in the prayer-book, as a matter of recognized usage and custom. No proof has been laid before me, and I can find none, as to the omission of these necessary acts during a period of more than a century, and I think the inference that they must have been still practised is reasonable and sound.

And in this opinion I am strengthened by observing that at the Savoy Conference the Dissenters objected "that the manner of the consecrating of the elements is not here" (i.e., in the consecration prayer) "explicite and distinct enough, and the minister's breaking of the bread is not so much as mentioned." The bishops replied by conceding that the manner of "consecrating the elements be made more explicit and express," which was the origin of our present rubric. (1)

The opinion of Bishop Cosin (Works, vol. v., p. 65, ed. 1855), a high authority upon this subject, appears to me sound. "And it is to be noted that the book does not everywhere enjoin and prescribe every little order, what should be said or done, but takes it for granted that people are acquainted with such common and things always used as such. Let the Puritans then here give over their endless cavils, and let ancient custom prevail, the thing which our Church chiefly intended in the review of this service." This reasoning, therefore, brings me to the conclusion, that from the mere silence

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[ (1) Cardwell's Conferences, pp. 321, 363.

1868 of the rubric a positive prohibition cannot in all cases be inferred.

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Something more is required to render the article supplied illegal. For instance, the mention of the article in a former prayer-book, and the omission of it in the present, may furnish a presumption that it was intentionally rejected, even when it be in itself innocent, or apparently expedient. Or the article must have, as has been already observed, some necessary connexion with a use inconsistent with the principles upon which the formularies of the Church are founded.

I must repeat that the rubrics with respect to decorations and furniture of the church are not exhaustive. This point has been decided by the Judicial Committee of the Privy Council. They allowed on this principle the use of the cross and the credence table and the various coloured cloths for the holy table. They allowed also the use of a moveable ledge for the purpose of holding candlesticks upon the holy table. This question came before their lordships as a corollary to their principal decision on the Knightsbridge Church cases. It was contended that the monition of the court with respect to St. Barnabas Church had not been obeyed as to the holy table or as to the cross.

The act on petition alleged, that the monition was still in part uncomplied with in the following particulars:—First, that the metal cross which was standing in the church or chapel, on or attached to the super-altar, on the stone altar, which formerly stood therein prior to the delivery of the judgment of the Judicial Committee on the 21st of March, 1857, was then placed on the sill of the great eastern window of the church or chapel of ease of Saint Barnabas, above the table then used as a communion table in the church or chapel. Second, that the table which had been substituted in the church or chapel for the stone altar which formerly stood therein was not a flat table, but had an elevation or structure placed thereon, so as to resemble what is generally known and described as a super-altar in Roman Catholic churches or chapels.

The answer on behalf of the Hon. and Rev. Robert Liddell and the then chapelwardens to this act on petition, denied that the monition was in any part uncomplied with, and pleaded; first, that the metal cross which was on the 27th of March, 1857, standing in



the church or chapel of St. Barnabas (attached to the ledge of wood at the back of the stone altar, which then stood in the chancel of the church or chapel) was at the present time placed on the sill of the centre compartment of the eastern window of the chancel of the church or chapel, five feet ten inches above the surface of the communion table standing there, and wholly disconnected therewith; secondly, that the table which had been substituted in the church or chapel for the stone altar which formerly stood therein was a flat moveable table of wood; and that the elevation or structure alleged in the second article of the act on petition as placed thereon was simply a moveable ledge of wood placed in order that two candlesticks might stand thereon at the back of the table, and that the ledge was always raised up before the celebration of the Lord's Supper, in order that the decree of the court might be complied with, namely, that a fine linen cloth should cover the communion table at the time of the ministration of the Lord's Supper, and that the cross was in the church or chapel at the time of the consecration thereof, and then formed one of the ornaments of the church or chapel.

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Their lordships were of opinion, "that no disobedience, no impropriety, no irregularity, has been established; and that the present application, therefore, failed." (1)

In the same spirit, usages not prescribed by the prayer-book during the service have been allowed,—such as turning to the east while the creeds are read, the "Glory be to Thee, O Lord," before the reading of the gospel, and the expression of thanks after the reading of it, the use of hymns—a use perhaps not only not ordered, but contrary to the order of the prayer-book; and an inscription on a tombstone of "pray for the soul" of a departed person, has been, by express judicial decision, pronounced not to be "contrary to the articles, canons, constitutions, doctrine, and discipline of the Church." (2)

And here I will notice what I may call the churchwarden argument. It has been said that one test of the legality of ornaments is whether the churchwardens can or cannot be compelled to provide them. I am of opinion, however, that this is not a conclusive

(1) *Liddell v. Beal*, 14 Moo. P. C. 1, 16.

(2) *Breeks v. Woolfrey*, 1 Curteis' Rep. 880.

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test. The law upon this subject was well and clearly laid down by Dr. Lushington (1),—namely, that there are two classes of expenses for parochial purposes; one, necessary expenses, which the churchwardens may defray of their own authority out of a rate, without the sanction of the vestry; another, expenses not absolutely necessary, a class which requires, if they are to be defrayed out of a rate, the previous sanction of the vestry. Under this latter category would fall all expenses incurred for furniture of a decorative kind, which would also require the sanction of the ordinary.

The Special  
 Charges con-  
 sidered.

Having thus considered the principles of law which ought to guide me in adjudicating the charges preferred against the reverend defendants in the cases before me, I will now consider and pronounce judgment upon each individual charge, which, for the sake of convenience, I will arrange in the following manner:—

First, the elevation of the blessed sacrament, including the kneeling.

Secondly, the use of incense during the administration of the holy communion.

Thirdly, the mixing the water with the wine during the administration of the holy communion.

Fourthly, the special charges against Mr. Simpson.

Fifthly, the use of lights during the administration of the holy communion.

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 as to Mr.  
 Mackonochie.

*3rd Article.*—The third of the articles in this suit charges the defendant, “That he, the defendant, has in his said church, and within two years last past, to wit, on Sunday, the 23rd of December, on Christmas Day last past, and on Sunday, the 30th of December, all in the year 1866, during the prayer of consecration, in the order of the administration of the holy communion, elevated the paten above the head, and permitted and sanctioned such elevation; and taken into his hands the cup and elevated it above his head, during the prayer of consecration aforesaid, and permitted and sanctioned the cup to be so taken and elevated; and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostration by other clerks in holy orders.”

(1) 1 Burns' Eccl. Law, p. 388 a, ed. Phillimore: *Gathercole v. Wade*.

*Answer.*—To this article the defendant has answered, “That whilst he admits that he, the defendant, did on the said two Sundays, and on Christmas Day, during the prayer of consecration, kneel, and sanction kneeling by other clerks, before the Lord’s Table, he denies that his said party did on the said two Sundays, and on the said Christmas Day, kneel or prostrate himself before the consecrated elements, or permit and sanction such kneeling or prostration by other clerks in holy orders, as in the 3rd article pleaded. And he further alleges that whilst he admits that he did on the said two Sundays and Christmas Day, in the said 3rd article mentioned, elevate, and sanction the elevation by other clerks, of the paten and cup above his head, as in the said 3rd article pleaded, yet that such elevation of the paten and cup has been wholly discontinued by the said defendant during the administration of the holy communion ever since the said 30th of December, 1866, and long prior to the institution of this suit; that such practice was discontinued in consequence of legal advice, and in compliance with the expressed wish of the Lord Bishop of the diocese of London, and with a resolution of Convocation, as was well known to the promoter of this suit before he instituted the same.”

*4th Article.*—The fourth article alleges “that such elevation of the paten, and such taking and elevation of the cup, and such kneeling and prostrating, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and administration of the sacraments and other rites and ceremonies of the Church, and are contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons, and also to an act of parliament passed in a session of parliament holden in the 13th year of Queen Elizabeth, cap. 12, and to the 25th and 28th of the articles of religion therein referred to.”

*Answer.*—The defendant to this article answers, “That he denies that the elevation of the paten and the taking and the elevation of the cup, so discontinued as aforesaid, and the kneeling and prostrating charged in the said 3rd article, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and

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administration of the sacraments, and other rites and ceremonies of the Church, or that they are contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons, and also to an act of parliament passed in a session of parliament holden in the 13th year of Queen Elizabeth, cap. 12, and to the 25th and 28th articles of religion therein referred to, as in the 4th article alleged.”

The elevation of the blessed sacrament was not incorporated formally into the law of the Western church before the beginning of the thirteenth century. The account given by Cardinal Bona is clear and concise (1): “*Latini peractâ consecratione, Græci paulo ante communionem, ut ex Liturgiis Jacobi, Basilii, et Chrysostomi manifestum est, corpus Dominicum et calicem elevant, ut a populo adoretur. Idque ab antiquo tempore fieri solitum indicant scriptores Græci.*” He then cites a variety of authorities in support of this position, and mentions the introduction of the custom of ringing a bell at the time of the elevation, at first as it should appear in order to excite the devotions of the faithful, and not for the purpose of the worship of the host. (2)

It was not till the year 1217, during the papacy of Honorius III., that this peculiar doctrine of elevation became part of the canon law.

In lib. iii., tit. xlii., Decret. Greg., cap. x., the decree upon the subject is as follows:—

“Sane, cum olim (*ut infra*). Ne propter incuriam Sacerdotum divina indignatio gravior exardescat, districtè præcipiendo mandamus, quatenus a Sacerdotibus Eucharistia in loco singulari, mundo et signato semper honorifice collocata, devote ac fideliter conservetur. Sacerdos vero quilibet frequenter doceat plebem suam, ut, cum in celebratione missarum elevatur hostia salutaris, se reverenter inclinet, idem faciens, cum eam defert Presbyter ad infirmum. Quam in decenti habitu superposito mundo velamine ferat, et referat manifestè ac honorifice ante pectus cum omni reverentia et timore, semper lumine præcedente, cum sit candor lucis æternæ, [ut ex hoc apud omnes fides et devotio augeatur. Prælati autem hujusmodi mandati graviter punire non differant

(1) *Rerum Liturgicarum*, lib. ii. chap. 3, s. 2.

(2) *Ibid.* p. 349.



transgressores: si et ipsi divinam et nostram volunt effugere ultionem." (1)

William, Bishop of Paris, soon after the beginning of the thirteenth century, made an order that, "Sicut alias statutum fuit, in celebratione missarum, quando corpus Christi elevatur, in ipsâ elevatione vel paulo ante campana pulsetur, ut sic mentes fidelium ad orationem excitentur."

And Archbishop Peccham, who was consecrated in the year 1278 and died in the year 1292, appears to have first introduced into England this custom by the following constitution (2):—

"Altissimus," *et infra*. "In elevatione corporis Christi ab una parte ad minus pulsentur campanæ, ut populares, qui celebrationi missarum non valent quotidie interesse, ubicunque fuerint, sive in agris sive in domibus, flectant genua, indulgentias concessas a pluribus episcopis habituri."

Lyndwood (writing, it is to be observed, about 1430) has this gloss: "*Elevatione*, quæ fit ut populus illud adoret."

This passage appears to me to dispose of the argument addressed to me by the leading counsel for Mr. Simpson, "that it had been the invariable practice of the Church of England not to connect adoration with elevation."

Nor am I satisfied by the difference between the canon of the Sarum use and that of the Roman missal upon this point, that at the time of the Reformation the adoration was separated from the elevation of the host. The true proposition is, that the original practice in England, as in other countries, had been to stir up the devotion of the people to God by the elevation of the blessed sacrament, until in this, as in so many other instances, the church, or, perhaps, more strictly speaking the curia, of Rome introduced an unwarrantable innovation upon an ancient and laudable usage.

The first prohibition of this custom, of elevating the host in

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(1) The title of the chapter is: "Eucharistia debet munde servari, et in ejus elevatione et delatione populus debet se inclinare: et cum deferitur ad infirmum, debet deferri in decenti habitu, et cum lumine, transgressores vero graviter sunt puniendi."

(2) The title of this constitution is:

"In elevatione corporis Christi pulsentur campanæ, ut officio interesse nequeunt, saltem genua flectant. Nec ministretur corpus Domini, nisi eis quos constat confessos esse, et parochianos ejus, in qua recipiant, ecclesia; nisi permissionem habeant, aut peregrini sint, aut necessitas urgeat."

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order that *it* might be adored, is to be found in the Order of the Communion of Edward VI., which was published in 1548, and preceded the first Book of Common Prayer. The last "note" to that order, after providing for the case in which it has become necessary to consecrate more wine than had been originally consecrated, contains these words, "and without any levation or lifting up." This prohibition would seem from the context to be limited to the case of an additional consecration of wine. In the first prayer-book, after the prayer of consecration, follow these words: "These words before rehearsed are to be said, turning still to the altar, without any elevation, or shewing the sacrament to the people."

The Council of Trent, by the 6th canon of the 13th session, passed the 11th of October, 1561, decrees: "*Si quis dixerit, in sancto eucharistiæ sacramento Christum unigenitum Dei Filium non esse cultu latriæ, etiam externo, adorandum, atque ideo nec festiva peculiari celebritate venerandum, neque in processionibus secundum laudabilem et universalem ecclesiæ sanctæ ritum et consuetudinem solenniter circumgestandum, vel non publice, ut adoretur, populo proponendum, et ejus adoratores esse idolatras, anathema sit.*"

The liberal mind and strong sense of Luther appear in his treatment of this question of elevation. In the "Formula Missæ et Communionis" for the Church at Wittenberg he gives this direction: "(IV.) Finitâ benedictione chorus cantet sanctus et sub benedictus *elevetur* panis et calix, ritu hactenus servato, vel propter infirmos qui hac repentinâ (mutatione) hujus insignioris in missâ ritûs forte offenduntur, *præsertim ubi per conciones vernaculas docti fuerint quid eâ petatur elevatione.*" (1) Daniel, the learned German editor of the Codex Liturgicus, observes, that the elevation was for a long time not only tolerated but approved of and defended by Luther. He thought it right that when the sacrament was lifted up a bell should ring; for the priest and the bell spoke the same language, namely, "Hearken, ye Christians, and behold; then take and eat, take and drink, this is the body and blood of Christ." Afterwards Luther placed the elevation "*inter adiaphora quæ possunt servari vel omitti ad habitum ecclesiarum,*" and discontinued it in the church at Wittenberg. The rite appears to

(1) Codex Liturgicus, vol. ii, p. 87, ed. Leipsic, 1848.

have prevailed during the sixteenth and seventeenth centuries in the churches of Sweden and Denmark.

By the 28th of the Thirty-nine Articles, which became part of the statute law in 1571, though passed in convocation with the consent of the Crown in 1562, it is declared, "That the sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

It is true that these words contain a declaration only, and no specific order; but looking to the spirit as well as to the letter of our present prayer-book, as well as to this article, and to the documents which illustrate the early period of the Reformation, it appears to me clear that those who guided the Church of England through this process of restoration to primitive antiquity were of opinion that the elevation was so connected with the repudiated doctrine of transubstantiation, as distinguished from the real presence, that it ought not to be suffered to remain. And I am confirmed in this opinion by the authority of some of the greatest divines in our church, of whom I will only cite two; one, the learned Grabe; the other, who received the thanks of the Sorbonne for his defence of the Nicene Creed,—Bishop Bull.

The former says, "But if it should be asked, of what use the said form, with such annotations, can be at present, when it is out of use, I answer, that it will serve at least to shew, to the honour of our forefathers, the first reformers of this church, how near they, concerning the celebration of that most holy sacrament, kept to the primitive institution of it by our blessed Saviour, and to the practice of his holy apostles and the first apostolical churches, although they changed and threw out many abuses and corruptions of this sacred ordinance which were crept in afterwards, and at last established by Popish decrees and councils of later ages. Such was, in the whole, the use of an unknown tongue in this holy office.

And not to mention the *elevation* of the consecrated elements to be worshipped by priest and all people as Jesus Christ himself, both God and man in person, whom the church of Rome believeth to be substantially and wholly present under the outward figures of bread and wine." (1)

(1) Grabe, MS. Adversaria.

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Bishop Bull, in a portion of his answer to the Bishop of Meaux, who had expressed his surprise that he was not a Romanist as well as a Catholic, says: "Come we now to the principal part of the Christian worship, the holy sacrament of the eucharist. How lamentably hath the church of Rome vitiated the primitive institution of that most sacred rite. She hath taken from the laity the blessed cup, contrary to our blessed Saviour's express command as expounded by the practice of the apostles, and of the universal church of Christ for the first ten centuries, as hath been above observed.

"All the learned advocates of the Roman church, with all their sophistry, have not been able to defend her in this matter from manifest sacrilege, and a violation of the very essentials of the sacrament, as to the laity administered, nor can they prove it so administered to be a perfect sacrament. He that would see this in a short compass fully proved, and all the weak evasions of the Romanists obviated, may consult our learned Bishop Davenant. Besides, the whole administration of it is so clogged, so metaphorised and defaced by the addition of a multitude of ceremonies, and those some of them more becoming the stage than the table of our Lord, that if the blessed apostles were alive and present at the celebration of the mass in the Roman church they would be amazed and wonder what the meaning of it was; sure I am they would never own it to be that same ordinance which they left to the churches.

"But the worst ceremony of all is the elevation of the host to be adored by the people as very Christ himself under the appearance of bread, whole Christ, Θεάνθρωπος, 'God and man,' while they neglect the old *sursum corda*, the lifting up of their hearts to heaven where whole Christ indeed is."

The kind of elevation which it is charged that at one time Mr. Mackonochie practised, and as to which witnesses were examined before me, amounts upon the evidence to the following acts, that after the consecration, both of the bread and of the wine, he elevated the paten and the cup respectively for an appreciable time, after which there was a pause before the service was continued; this evidence was taken at the beginning of the cause; but during the progress of the argument, at the desire and with



the consent of both counsel, Mr. Mackonochie was examined by me upon the single point, whether when the elevation was made his face was or was not towards the people, Mr. Mackonochie said, "I do not turn round to the people, and I never have done so during any time of the consecration prayer." (1)

This elevation Mr. Mackonochie asserts, and it is not denied, that he discontinued after conference with his diocesan, and upon the other grounds to which I have already referred, before the institution of this suit.

I am very glad that he did so, because in my judgment that kind of elevation was unlawful, and I must and do admonish Mr. Mackonochie not to recur to it.

His present practice is not complained of, and some elevation the rubrics of the present communion service must contemplate when they order as follows: "Here the priest shall take the paten into his hands," that is, into both his hands; subsequently to which he is ordered to break the bread. So, also, when he is directed to take the cup into his hand, there must be some elevation from the holy table.

It is alleged in the 5th article filed against Mr. Simpson, in the suit of *Flamank v. Simpson*, that he, Mr. Simpson, has, within two years last past, in the said parish of East Teignmouth, in the public celebration of the holy communion, after the prayer of consecration, raised the paten with both hands over his head, and the cup in like manner. And that such elevation of the paten and cup are unlawful additions to, and alterations of, the form and order prescribed and appointed by the said Book of Common Prayer and administration of the sacrament, and other rites and ceremonies of the Church, and are contrary to the said statute law, constitutions, and canons.

Mr. Simpson, in the 4th answer filed by him, denies that he

(1) I have said "with the consent and desire of both counsel," because such was the fact; but if Mr. Mackonochie was by law an incompetent witness, their consent in a criminal case would not render his evidence admissible; but I venture to think that he was a competent witness, and am em-

boldened to hold this opinion, though it be at variance with that of my predecessor, in consequence of the observation made by the Lords of the Privy Council in *Berney v. The Lord Bishop of Norwich*, a case in which judgment was delivered on the 28th of February, 1867.

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has, as in the said 5th article alleged, within two years last past, so raised the paten with both hands over his head, and the cup in like manner. But he says that he has, within the time aforesaid, in the reading the prayer of consecration, so raised the paten on pronouncing the words "Do this in remembrance of me;" and he has so raised the cup on pronouncing the words "This is my blood of the New Testament which is shed for you and for many, for the remission of sins."

It clearly follows, from what I have said as to Mr. Mackonochie, that the elevation practised by Mr. Simpson is unlawful, and must be discontinued.

Kneeling.

With respect to the charge against Mr. Mackonochie of kneeling or prostration before the eucharist, I observed during the course of the argument that no charge of adoration of the holy sacrament itself, or of our Lord's body being present after a corporal manner in the holy sacrament, was contained in these articles; that if it was intended to charge Mr. Mackonochie with either kind of adoration, the rules of pleading in criminal cases in this court would have required that such adoration should have been distinctly and plainly averred.

The argument before me was confined to the allegation of improper or excessive kneeling; the evidence as to the fact was very far from being clear; Mr. Mackonochie was asked no question himself upon the subject.

Mr. Beames said, that after the elevation of the cup, Mr. Mackonochie prostrated himself on his knees with his head to the ground, and then that he knelt immediately after the cup was replaced, and that there was the same kneeling after the elevation of the paten. It was clear, however, from the evidence of this witness that Mr. Mackonochie remained on his knees, and that his head did not touch the ground, and that he did not really prostrate himself, supposing that such a gesture of devotion to be, which I do not pronounce it to be, illegal.

The only other witness, the Reverend Henry Malim, deposed that the clergy, already kneeling, threw their bodies forwards, and that the consecrating clerk knelt in the middle of the prayer, and then went on with the prayer. But on further examination he said that he was behind him all the time, that he could not in fact

say that he prostrated himself, but to use his own words, "there was a somewhat excessive bending forwards." He said he was kneeling himself at the time, and that it was his own practice, when not assisting, to kneel during the prayer of consecration.

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It is true that the rubric does not give precise directions that the celebrant himself should kneel at the times when it appears that Mr. Mackonochie does kneel; but I am very far from saying that it is not legally competent to him, as well as to the other priests and to the congregation, to adopt this attitude of devotion. It cannot be contended that at some time or other he must not kneel during the celebration, although no directions as to his kneeling at all are given by the rubric.

It is observable that at the Savoy Conference the Puritans asked to have it considered "Whether it will not be fit to insert a rubric touching kneeling at the communion, that is, to comply in all humility with the prayer which the minister makes when he delivers the elements."

No notice of this request was taken by the bishops, unless it be considered to be included in their concession, "That the general confession at the communion be pronounced by one of the ministers, the people saying after him, all kneeling humbly upon their knees." (1)

Moreover, in my opinion, if Mr. Mackonochie has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the category of those cases which should be referred to the bishop, in order that he may exercise thereupon his discretion, according to the rubric to which I have already referred.

The charge against Mr. Mackonochie as to the use of incense is Incense. twofold; the first part relates to what is technically called "censing persons and things," and is as follows:—

*7th Article.*—The 7th article alleges, "that the said defendant has in his said church, and within two years last past, to wit, on Sunday, the 23rd December, on Christmas Day last past, and on Sunday, the 30th December, all in the year 1866, used incense for censing persons and things in and during the celebration of the holy communion, and permitted and sanctioned such use of incense."

(1) Cardwell's Conferences, pp. 275, 363.

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*Answer.*—And the defendant in answer to this article says, “that he admits that he (the defendant) on the Sunday, the 23rd December, on Christmas Day last past, and on Sunday, the 30th December, used incense for censuring persons and things in and during celebration of the holy communion, and permitted and sanctioned such use of incense;” but he alleges, “that ever since the 30th December, 1866, he, the said defendant, as was well known to the promoter of this suit prior to the institution thereof, desisted from so doing, and has ever since discontinued the said ceremony, on being apprised by the opinion of counsel that such usage was of a doubtful legality, and that he has never since so introduced the said ceremony, as appears in the published address of the said defendant, dated January, 1867, and exhibited and appended to the articles brought in and admitted in this cause.”

I should here observe that an objection was taken on behalf of Mr. Mackonochie, that this charge of censuring persons and things was not specified in the decree issued under the letters of request, and therefore, that according to the practice of this court, it could not be preferred in the articles. My learned predecessor overruled this objection, and I thought it right, whatever my opinion might be, to abide by his decision.

It appears that Mr. Mackonochie has discontinued, though under protest, this particular use of incense, upon the same grounds and for the same reasons that he discontinued the elevation, and also before the institution of this suit.

The other part of the charge relates to another use of incense, and is laid in the following words:—

*8th Article.*—The 8th article alleges, “that the said defendant has in his said church, and within two years last past, to wit, on Sunday, the 13th day of January, A.D. 1867, unlawfully used incense in and during the celebration of the holy communion, and permitted and sanctioned such unlawful use of incense.”

*Answer.*—To this the defendant has answered, “That he admits that he has in his said church, to wit, on Sunday, the 13th day of January, A.D. 1867, caused and allowed incense to be burnt during the reading of the prayer of consecration, and afterwards until the time for the administration of the communion to the people, and permitted and sanctioned such use of incense, but that he



denies that he used the same unlawfully, or that such use is unlawful."

*9th Article.*—The 9th article charges, "that such uses of incense as in the two preceding paragraphs alleged are severally an unlawful addition to, and variation from, the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and are contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons."

*Answer.*—The defendant in his plea has answered, "that he denies that such use of incense as in the 7th and 8th articles alleged are severally an unlawful addition to, and variation from, the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and are contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons, as in the 9th article alleged."

The objection is not taken to the general use of incense for the purposes of ornament or fumigation of the church, for which purposes it appears to have been used at various times since the Reformation, and especially by the saintly Herbert to whom Mr. Coleridge referred:—

"The country parson," Herbert says, "hath a special care of his church, that all things there be decent and befitting his name by which it is called. Therefore, first, he takes order that all things be in good repair, as walls plastered, windows glazed, floor paved, seats whole, firm, and uniform, especially that the pulpit and desk, and communion table and font, be as they ought, for those great duties that are performed in them. Secondly, that the church be swept and kept clean, without dust or cobwebs, and at great festivals strewed and stuck with boughs, and perfumed with incense. Thirdly, that there be fit and proper texts of scripture everywhere painted, and that all the painting be grave and reverend, not with light colours or foolish antics. Fourthly, that all the books appointed by authority be there, and those not torn or fouled, but whole and clean, and well bound; and that there be a fitting and sightly communion cloth of fine linen, with a handsome and

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seemly carpet of good and costly stuff or cloth, and all kept sweet and clean in a strong and decent chest, with a chalice and cover, and a stoop or flagon, and a basin for alms and offerings; besides which, he hath a poor man's box conveniently seated to receive the charity of well-minded people, and to lay up treasure for the sick and needy. And all this he doth, not as out of necessity, or as putting a holiness in the things, but as desiring to keep the middle way between superstition and slovenliness, and as following the apostle's two great and admirable rules in things of this nature; the first whereof is 'Let all things be done decently and in order;' the second, 'Let all things be done to edification.'" (1)

The burning of frankincense, probably on account of the grateful odour which it emits, and the graceful form which it assumes, may be traced, as an accompaniment of prayer, thanksgiving, and sacrifice, to the very earliest antiquity. All classical readers are aware of the *βωμὸς θυρίεις* of Homer (2), and of the "centum aræ Sabæo thure calentes." (3) The use of incense in the Jewish worship was divinely ordained. (4) Nadab and Abihu were stricken with death because "they took either of them his censer, and put fire therein, and put incense thereon, and offered strange fire before the Lord." (5) And Aaron, when he "made an atonement for himself and his house," was directed to "take a censer full of burning coals of fire from off the altar before the Lord." (6) Solomon provided "censers of pure gold" for the temple of the Lord. (7)

And it was truly urged that Zacharias was burning incense

(1) Works of G. Herbert, vol. ii. chap. xiii. p. 192, title "A Priest to the Temple."

(2) Iliad, viii. 48.

(3) Virg. Æn. l. 416, 417 . . . . .  
 . . . . . centumque Sabæo  
 Ture calent aræ.

(4) Incense.—"Dictionary of the Bible":—

"Looking upon incense in connection with the other ceremonial observances of the Mosaic ritual, it would rather seem to be symbolical, not of prayer itself, but of that which makes prayer acceptable, the intercession of Christ. In Rev. viii. 3, 4, the incense is spoken

of as something distinct from, though offered with, the prayers of all the saints (Luke i. 10), and in Rev. v. 8, it is the golden vials, and not the odours or incense, which are said to be the prayers of saints. Psalm cxli. 2, at first sight, appears to militate against this conclusion; but if it be argued from this passage that incense is an emblem of prayer, it must also be allowed that evening sacrifice has the same symbolical meaning."

(5) Lev. x. 1.

(6) Lev. xvi. 12.

(7) 1 Kings vii. 50.

according to the custom of the priest's office, in the temple of the Lord (1), when he received the message from the angel; and that in many places in holy writ prayer is symbolized by incense. It appears to have been very early in use, though the exact date of it is uncertain, among the Christians; it is mentioned in the apostolical canons, and there is no doubt that it is warranted by the authority of the primitive church.

It certainly was in use in the Church of England in the time of King Edward the Sixth's first prayer-book. The visitation articles of Cranmer as to forbidding the censing to certain images, &c., supplies one of the proofs of this fact. On the other hand, the use of it during the celebration of the eucharist is not directly ordered in any prayer-book, canon, injunction, formulary, or visitation article of the Church of England since the Reformation. Bishop Andrewes, a very high authority, appears to have used it, though in what way is not clear, in his own private chapel; and probably traces of the use of it may be found in the private chapels of other bishops, and in the royal chapels.

It is not, however, necessarily subsidiary to the celebration of the holy communion, and it is not to be found in the rubrics of the present prayer-book, which describe with considerable minuteness every outward act which is to be done at that time.

To bring in incense at the beginning or during the celebration, and remove it at the close of the celebration of the eucharist, appears to me a distinct ceremony, additional and not even indirectly incident to the ceremonies ordered by the Book of Common Prayer.

Athough therefore it be an ancient, innocent, and pleasing custom, I am constrained to pronounce that the use of it by Mr. Mackonochie in the manner specified in both charges is illegal, and must be discontinued.

*Article 10.*—The 10th article against Mr. Mackonochie alleges, Mixing Water  
“that he, the defendant, has in his said church, and within two with the  
years last past, to wit, on Sunday, the 23rd day of December, on Wine.  
Christmas Day last past, on Sunday, the 30th day of December,  
all in the year of our Lord 1866, and on Sunday, the 13th day of  
January, A.D. 1867, during the celebration of the holy communion,

(1) St. Luke, c. 1.

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mixed water with the wine used in the administration of the holy communion, and permitted and sanctioned such mixing, and the administration to the communicants of the wine and water so mixed."

*Answer.*—The defendant admits this article to be true.

*Article 11.*—The 11th article states, "that such mixing and administration of the wine and water is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 20th, 21st, 36th, and 38th of the said constitutions and canons."

*Answer.*—The defendant has denied in his plea "that such mixing and administration of the wine and water, as in the said 10th article alleged, is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 20th, 21st, 36th, and 38th of the said constitutions and canons, as in the said 11th article alleged."

There is a similar charge against Mr. Simpson.

It appears that from a very early period—the precise date is uncertain—a custom prevailed amongst Christians of adding a very small quantity of water to the wine which forms one element of the Blessed Sacrament. This custom, whether it arose from a belief that the wine used by the Jews at the Passover, and by our Lord at the Last Supper, was mingled with water, or from some reason symbolical of his passion, is wholly unconnected with any papal superstition, or any doctrine which the Church of England has rejected. It has the warrant of primitive antiquity and of the undivided church in its favour.

The whole subject will be found discussed with his usual perspicuity and subtilty by Thomas Aquinas in the third part of his *Summa Theologica*, quæstio 74, "De materiâ eucharistiæ quantum ad speciem," which is divided into eight articles; the sixth of which is, "Utrum sit admiscenda aqua;" the seventh, "Utrum aqua sit de necessitate hujus sacramenti;" the eighth, "De quan-



titate aquæ quæ apponitur." With regard to the sixth, he decides "that some water shall be mingled with the wine; with regard to the eighth, that it should be a very small quantity, "paululum aquæ," and for this reason, "quia si tanta fieret appositio aquæ ut solverentur species vini, non posset perfici sacramentum." And in accordance with this view, with regard to the seventh, it is important to observe that he decides, that "aquæ admixtio non est de necessitate sacramenti." The mingling of water, therefore, with the sacramental wine is clearly within that category of ceremonies as to the adoption of which each branch of the Church has its own liberty.

In our own church this custom prevailed before the Reformation; and in the first order of the communion which preceded the first prayer-book the rubric directed that the priest should "bless and consecrate the biggest chalice or some fair and convenient cup or cups full of wine with some water put unto it;" and the rubric to the communion service of the first prayer-book directs that the minister shall "take so much bread and wine as shall suffice for the persons appointed to receive the holy communion . . . and putting the *wine* into the chalice or else in some fair and convenient cup prepared for that use (if the chalice will not serve), putting thereto a little *pure and clean water*, and setting both the bread and *wine* upon the altar." It is clear, therefore, that under the word "wine" might be comprehended the wine and water; and in a subsequent rubric at the end of the service the direction is, that the pastors and curates shall find at their costs and charges "sufficient bread and wine for the holy communion."

In all subsequent prayer-books the mention of water is omitted; perhaps from the omission in the second prayer-book no argument unfavourable to the use of water could fairly be drawn, as no manual acts of consecration are prescribed in that book. But in the present prayer-book the manual acts are advisedly specified with great distinctness and particularity; exact directions are given when the priest shall take into his hands the bread and the wine, when he shall place them on the table, and how he shall administer them; and I must bear in mind that the compilers of our present prayer-book had before them the first prayer-book of Edward VI., and carefully considered the rubrics which it con-

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tained; and in my opinion the legal consequence of this omission, both of the water and of the act of mixing it with the wine, must be considered as a prohibition of the ceremony or manual act of mixing the water with the wine during the celebration of the eucharist.

I am by no means insensible to the very remarkable argument addressed to me by Dr. Deane with respect to the analogy between the blood and water used in the prototypal service of the passover, and the wine and water in the eucharist; and, as I have already observed, the mingling a little pure water with the wine is an innocent and primitive custom (1), and one which has been sanctioned by eminent authorities in our church, and I do not say that it is illegal to administer to the communicants wine in which a little water has been previously mixed; my decision upon this point is, that the mixing may not take place during the service, because such mixing would be a ceremony designedly omitted in and therefore prohibited by the rubrics of the present prayer-book.

The 6th article alleges that Mr. Simpson has, within two years last past, in his said parish church, on receiving the alms collected at the offertory, placed the said alms (and the basin containing them) on a stool instead of on the holy or communion table, and that such placing of the alms on a stool, and not on the communion table itself, is an unlawful alteration in and deviation from the form and order prescribed and appointed by the said Book of Common Prayer, &c.

Mr. Simpson, in his answer, admits that he has so placed the said alms, and the basin containing them, on a stool used as a credence table instead of on the holy communion table; but he denies that he has done so otherwise than to obtain more room upon the said holy communion table. His counsel very properly stated that Mr. Simpson had done wrong, that he regretted having done so, and submitted himself to the judgment of the Court.

The 7th article filed against Mr. Simpson, namely, that he wilfully omitted the word "all" in saying the last prayer in the order

(1) The poet Spenser thus describes his *Fidelia*:—

"She was araied all in lily white,  
 And in her right hand bore a cup of gold,  
 With *wine and water* fill'd up to the hight."

F. Q., Book I., canto 10, st. 13.

Charge  
 against Mr.  
 Simpson of  
 placing the  
 Alms upon a  
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of morning and of evening prayer, has been abandoned, and I need not again advert to it.

*Article 5.*—The 5th article against Mr. Mackonochie alleges, “that the defendant has in his said church, and within two years last past, to wit, on Sunday, the 23rd of December, on Christmas Day last past, on Sunday, the 30th of December, all in the year of our Lord 1866, and on Sunday, the 13th day of January, in the year of our Lord 1867, used lighted candles on the communion table during the celebration of the holy communion at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.”

The answer to this article alleges, “that such charges are, in part, untruly pleaded, for the party proponent (the defendant) alleges that on the said three Sundays and Christmas Day, in the said 5th article mentioned, the said lighted candles were not placed on the communion table, but upon a narrow moveable ledge of wood resting on the said table, and that the said candles were so placed and kept lighted, not during the celebration of the holy communion only, as falsely suggested in the said 5th article, but also during the whole of the reading of the communion service including the epistle and gospel, and during the singing after the reading of the Nicene Creed, and during the delivery of the sermon.”

*Article 6.*—The 6th article alleges, “that the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons.”

And the defendant, in answer to this, “denies that the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 36th, and 38th of the said constitutions and canons, as in the said 6th article alleged.”

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A similar charge has been made against Mr. Simpson.

There is no express direction in the rubrics, or in the Statutes of Uniformity, or in the Canons of 1603 for the use of lights at all on the holy table. Nor is there in these documents any express prohibition of this ornament of divine service; and, adhering to the principle which has guided my judgment in the matters of the elevation, the mixing of water with wine, and of the incense, it becomes my duty to consider whether the use of lights on the holy table falls under the category of things indirectly, or by necessary implication, prohibited upon the grounds which have been stated, or whether it be lawful either as indirectly ordered or innocently subsidiary to divine worship. But there is also another consideration peculiar to this subject, and which must in some degree distinguish the treatment of this ornament from that which the others have received, namely, the important consideration whether the use of lights has not been ordered by competent authority, and whether that order must not, upon legal principles of construction, be deemed a part of the present law of the Church.

The rubric directs, "that such ornaments of the church and the minister thereof shall be retained and be in use as were in this Church of England by the authority of parliament in the second year of the reign of King Edward the Sixth." The Judicial Committee of the Privy Council have instructed me as to the legal meaning of the word "ornament" in this rubric. (1) Their lord-

(1) Their lordships refer to Forcelini's Lexicon for the meaning of Ornamentum; it is clearly explained in Lyndewood:—

*Lyndewood*, p. 52. (*Walterus*.) "Sint (sc. Archidiaconi) Ecclesiarum Rectores;" *et infra*. "Provideant Archidiaconi ut linteamina et alia <sup>(m)</sup> ornamenta altaris, sicut decet, <sup>(n)</sup> sint honesta; ut libros habeat ecclesia idoneos ad psallendum pariter et legendum: et ad minus duplicia sacerdotalia vestimenta; et ut honor debitus divinis officiis in omnibus impendatur. Præcipimus etiam ut qui altari ministrat, suppellectio induatur."

(Gloss.) (m.) *Ornamenta altaris*.

*Qualia sunt frontilia, cortinæ, et cætera hujusmodi.*

(n.) *Sicut decet*. Hæc decentia respici debet secundum qualitatem ecclesiæ et ipsius facultates; ut scilicet secundum quod ecclesia magis abundat in facultatibus, sic meliora et preciosiora habeat ornamenta.

Pp. 49, 50. (Title.) *De Officio Archidiaconi*. "Archidiaconi est prospicere ut sacramenta ritè conserventur et administrentur, atque potissimum Eucharistia et sanctum oleum sub clavibus custodiantur. Ornamenta quoque ecclesiarum ab eodem visitentur, et possessiones recenseantur."

*Stephanus*. "Habeant etiam Archi-



ships say as follows: "All the several articles used in the performance of services and rights of the Church are 'ornaments.' Vestments, books, cloths, chalices, and patens are amongst church ornaments; a long list of them will be found extracted from Lyndewood in Dr. Phillimore's edition of Burn's Ecclesiastical Law, vol. i. pp. 375—377. In modern times organs and bells are held to fall under this denomination." Their lordships go on to say, and I invite particular attention to their language: "When reference is had to the first prayer-book of Edward the Sixth, with this explanation of the term 'ornaments,' no difficulty will be found in discovering, amongst the articles of which the use is there enjoined, ornaments of the church as well as ornaments of the ministers. Besides the vestments differing in the different services, the rubric provides for the use of an English bible, the new prayer-book, a poor man's box, a chalice, a corporas, a paten, a bell, and some other things." "That these articles were included in the term 'ornaments of the Church' at the period in question is clear from two documents nearly contemporaneous, one before and the other after the establishment of the first prayer-book."

"In a letter of the council to Cranmer, dated the 30th April, 1548, to be found in Strype's 'Memorials of Cranmer, vol. ii. p. 90, they complain of the conduct of certain churchwardens, who sent away their chalices, crosses of silver, bells, and other ornaments of

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diaconi in scriptis redacta omnia ornamenta (\*), et utensilia (u), ecclesiarum. Vestes quoque et libros, quæ singulis annis suo faciant conspectui præsentari, ut videant quæ fuerunt adjecta per diligentiam personarum; vel quæ tempore intermedio per ipsarum malitiam vel imperitiam deperierunt."

(Gloss.) (\*) *Ornamenta*. Quæ sic dicta sunt, quia eorum cultu ecclesiæ ornantur et decorantur. Sunt namque ornamenta secundum *Januen*, decus, gloria, laus, dignitas, sive preciosa vestimenta seu jocalia, quorum cultu ecclesiæ decorantur.

(u.) *Utensilia*, i.e. ad utendum apta

sive necessaria. Hæc autem alibi vocantur Cimelia, sicut legitur *extra de offi. Arch. c. ea quæ et 12 q. 2 Apostolicos*. Et per hæc utensilia intelliguntur vasa ecclesiæ quæcunque, sacrata vel non sacrata.

*Constitutio Domini Othonis*, p. 52.

"De Archidiaconis quoque statuimus ut ecclesias utiliter et fideliter visitent, de sacris vasis et (e) vestibus, et qualiter diurnis et nocturnis officiis ecclesiæ serviatur, et generaliter de temporalibus et spiritualibus inquirendo.

(Gloss.) (e.) *Vestibus*. Repete sacris, dictis vulgariter vestimentis. Supple, et cæteris ecclesiæ ornamentis.

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the Church; and in a commission, in 1552, 1 Card. Doc. Ann., p. 112, No. xxvii. (Ed. 1844), the commissioners are enjoined to leave 'in every church or chapel of common resort one, two, or more chalices or cups, according to the multitude of people in every such church or chapel, and also such other ornaments as by their discretion shall seem requisite for the divine service in every such place for the time." (1)

Edward the Sixth succeeded to the throne on January 28, 1546-7. His Privy Council showed an early intention of carrying much further the Reformation began in the preceding reign. For this object homilies were composed, mixed commissions of clergy and laity were formed, with circuits assigned to them and large visitatorial powers.

These royal visitations superseded and practically inhibited for a time diocesan visitations.

In 1547 the royal injunctions, the subject of so much discussion during the course of the argument, were issued. I refer to a very curious and rare edition with which I have been furnished, printed in London in 1547, contemporaneously therefore with the issue of the injunctions themselves. The injunctions begin as follows:—

"The Kynges mooste royal majestie, by the advice of his most dere uncle the Duke of Somerset, Lorde Protector of all his realmes, dominions, and subjectes, and governor of his most roiall persone, and the residence of hys moste honorable counsail, intending the advauncemēt of the true honor of Almighty God, the suppression of idolatrie, and supersticiō, throughout all hys realms of dominions, and to plant true religion, to the exterpaciō of all hipocrisy, enormities, and abuses, as to hys duety apperteineth; doth minister unto his loving subjectes, these godly injunctiōs, hereafter followig: Whereof, parte were genē unto them heretofore, by authoritie of his most derely beloved father, Kyng Henry the eighte, of most famous memorie and parte are nowe ministered and geven by hys Majesty; all which injunctions, his highness willeth and cōmañdeth his saied louing subjectes, by his supreme auctoritie, obediently to receoue, and truely to observe and kepe, euery mā in their offices, degrees, and states, as they will avoyde his displeasure, and the paynes in the same injunccions hereafter expressed." . . .

{ (1) *Westerton v. Liddell*, Moore's report of the case, pp. 156, 157. }

The reference to the injunctions issued by Henry the Eighth is important in its bearing upon an argument presently to be noticed.

I pass on to the injunctions more immediately affecting the present subject. Their general object, it will be seen, is to remove all ornaments that relate to superstition or idolatry.

“Besides this, to the intent that all supersticion and hypocrisy, crept into diverse mennes hartes, may vanysh away, thei shal not set furth or extolle any images, reliques, or miracles, for any supersticiō or lucre, nor allure the people be any inticementes, to the pylgrimage of any saint or ymage; but reprovyng ȳ same, they shall teache, that al goodnesse, health, and grace, ought to be both asked and loked for only of God, as of the varye author and gever of the same, and of none other.”

*Item.*—“That they, the persones above rehersed, shall make or cause to bee made in their churches, and every other cure thei have, one sermō, every quarter of the yere at the least, wherein they shall purely and syncerely, declare the woorde of God; and in the same exhorte their hearers to the woorkes of faythe, mercye, and charitie, specially prescribed and commanded in scripture, and that woorkes devised by manne’s phātasies, besides scripture, as wanderyng to pilgrimages, offeryng of money, cādelles or tapers, to reliques, or images, or kysying and lickyng of the same, prayyng upon beades, or such lyke supersticiō, have not only no promise of reward in scripture, for doying of the: but cōtrariwise, great threatates and maledicciōs of God, for that they bee thynges, tendyng to idolatry and supersticiō, which, of al other offences God Almighty doth most detest and abhorre for that the same diminishe moste his honor and glory.”

The next injunction is the one which affects the question as to the lawfulness of these lights.

*Item.*—“That suche images as thei knowe in any of their cures, to bee, or have been so abused with pilgrimage or offrynges, of any thyng made thereunto, or shal bee hereafter censed unto, thei (and none other private persones) shall for the advoyding of that moste detestable offence of idolotrie, furthewith take downe or cause to bee taken downe, and destroye the same, and shall suffre from hensefurthe, no torches, nor candelles, tapers or images of

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ware, to be sette afore any image or picture, but onely twoo lights upon the high aluter, before the sacrament, whiche, for the significacion, that Christe is the very true light of the worlde, thei shall suffre to remain still; admonishyng their parishioners that images serve for no other purpose, but to bee a remembrance, whereby, man maie bee admonished of the holy lifes and conversacion of them that the said images doo represent; whiche images, if they doo abuse for any other intent, they commit idolotrie in the same, to greate daunger of their soules."

A variety of questions arise upon the subject of these injunctions; but they may be all, I think, comprehended under the following heads:—

1. Were these injunctions lawfully issued under statutable authority?

2. If so, were they subsequently abrogated by statutable authority?

It could not have been accurately said, and it has very properly not been contended by the counsel for the promoter, that any judgment has been given upon this subject which is binding upon this Court.

In the Saint Barnabas case, the use of lighted candles during the holy communion service, an opinion, which will presently be considered, adverse to their legality was expressed by the learned judge of the Consistory of London, but during the progress of the suit it appeared that as a matter of fact the candles were not lighted as alleged, and no decree was made by the Court. The legality of lighted candles on the holy table therefore was not directly submitted to the judgment of the Court of Arches or of the Privy Council; but it will be seen that the latter tribunal expressed an opinion both in favour of the lawfulness of the injunctions and of the candlesticks upon the holy table.

First, let me consider whether these injunctions were lawfully issued. The question is one of no mean difficulty. To define with certainty the exact legal limits within which the Crown might in the time of Edward VI. exercise its prerogative in relation to the Church, is a task which no one cognizant of the difficulties which surround the subject would willingly undertake.

It is said in the books that the Crown has power to *visit, reform,*



and correct abuses in the Church by the ancient law (1) of the realm. What this power was, however, is very uncertain. When Henry the Eighth procured from parliament the title of Supreme Head of the Church (though in fact, whatever servile courtiers might say, he did but regain the position from which the pope had expelled the Crown) he, no doubt, asserted that this authority required no sanction of parliament for its exercise, but it is remarkable that he obtained that sanction, as well as that of convocation, for almost every important act which he did to the Church.

In truth, our XXXVIIth Article of the Civil Magistrates fixes the bounds of the Royal authority in matters of religion:—

“The Queen’s Majesty hath the chief power in this realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction.

“When we attribute to the Queen’s Majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God’s word or of the sacraments, the which thing the in junctions also lately set forth by Elizabeth our Queen do most plainly testify, but that only prerogative which we see to have been given always to all godly princes in holy scripture by God himself; that is that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers. The Bishop of Rome hath no jurisdiction in this realm of England.” (2)

(1) 2 Roll. Abr. 230. Prerogative le Roy. (E.) *Quel person visitera.*

1. Per l’auncient Ley de Realm le Roy ad power de visit reform et correct toutes abuses et enormities en l’Eglise. (Davis, 1; Proxies, 4.)

2. Per le statute temps H, 8, le corone fuit lorsque remit et restore a son auncient jurisdiction que fuit usurp per l’Evesque de Rome. (Davis, 1; Proxies, 4.)

(2) The Abbé Fleury quite under-

stood this position. (Disc. sur l’Hist. Eccles., Dissert. ix.) “Le titre de *Chef de l’Eglise* que les Anglicans ont donné à leur Roi, ne doit pas être pris à la rigueur. En lui donnant cette qualité, il ne prétend point qu’il puisse exercer les fonctions ecclésiastiques, donner la mission aux Evêques et aux Prêtres, administrer les sacrements, en un mot, qu’il soit le principe de la puissance spirituelle. Il ne lui donne point d’autre autorité dans les matières

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When Cranmer was persecuted under the form of a trial at Oxford, Dr. Martin, who appeared as his judge, asked him (I take the account from the last volume of the Dean of Chichester's work) "Who was the supreme head of the Church of England?" The archbishop was glad to have an opportunity of explaining his former rather strong assertions on this point. "Marry," he said, "Christ is head of this member, as he is of the whole of the body — of the universal Church." "Why," quoth Dr. Martin, "you made King Henry the Eighth supreme head of the Church." "Yea," said the archbishop, "of all the *people* of England, as well ecclesiastical as temporal." "And not of the Church?" asked Martin. "No," said Cranmer, *for Christ is only* head of this Church, and of the faith and religion of the same. The King is head and governor of his people, which are the visible Church." "What!" quoth Martin, "You never durst to tell the King so?" "Yes, that I durst," quoth he, "and did, in the publication of his style; *wherein he was named supreme head of the Church there was never other thing meant.*" (1)

It is, to say the least, extremely doubtful whether, at any period of our constitution, the Crown had power to issue, of its own authority, injunctions of this kind.

It becomes, therefore, important to consider the language of what is called the Supremacy Act.

The statute of 26 Hen. VIII. cap 1, was passed A.D. 1534, and enacts as follows :

"Albeit the King's Majesty justly and rightfully is and ought to be the supreme head of the Church of England, and so is recognized by the clergy of this realm in their convocations, yet nevertheless for corroboration and confirmation thereof, *and for increase of virtue in Christ's religion within this realm of England, and to repress and extirp all errors, heresies, and other enormities and abuses heretofore used* in the same, be it enacted by authority of

de la religion, que celle de faire des lois pour maintenir le bon ordre de l'Eglise, de soutenir et appuyer celles qui sont faites par les Evêques, d'assembler des conciles, de contenir les ecclésiastiques comme des laïques dans la

soumission due au Prince, à l'exclusion de toute puissance étrangère."

See, too, the first canon of 1603.

(1) Hook's Lives of the Archbishops of Canterbury, vol. ii. (n. s.) p. 373.

this present Parliament, that the King our Sovereign Lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head on earth of the Church of England, called *Anglicana Ecclesia* (2) and shall have and enjoy, annexed and united to the imperial crown of this realm, as well the title and style thereof, as all honours, dignities, preheminenes, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of supreme head of the same Church belonging and appertaining; (3) and that our said Sovereign Lord, his heirs and successors, kings of this realm, shall have full power and authority from time to time to *visit, repress, redress, reform, order, correct, restrain, and amend* all such errors, heresies, abuses, offences, contempts, and enormities, whatsoever they be, which by any manner, spiritual authority, or jurisdiction, ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity, and tranquillity of this realm, any usage, custom, foreign laws, foreign authority, prescription, or any other thing or things to the contrary hereof notwithstanding."

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There is no doubt that under the authority of this statute the three royal injunctions in the years 1536 and 1538 were issued. The statute of 21 Hen. VIII. cap. 8, intituled, "An Act that Proclamations made by the King shall be obeyed," commonly called the Proclamation Act, was not passed till the year 1539. (1)

Strype remarks, "that these last injunctions were given out by occasion of the negligent observation of the former, which the clergy took little heed to."

There is no reason for surprise, therefore, in finding some of them repeated in the next reign (*see* p. 496 in fine), such especially as that which orders the ministers to preach against "offering candles and tapers to reliicks."

It has been argued by Mr. Stephens, adopting the opinion of Sir John Dodson, that this statute, as well as every statute "relating to doctrine or other matters of religion," has been repealed by 1 Edward VI. c. 12, passed in the year 1547. The proposition

(1) Strype's Memorials, vol. i. part i. 494-7.

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appeared to me at the time, having regard to the necessary consequences flowing from it, to be of an alarming character; and, after very mature deliberation, I have arrived at the conclusion that it cannot be sustained. The section which it is alleged possesses this great power of abrogation and repeal (section 2) is as follows:—" And also be it enacted by thautoritie aforesaide, that all Actes of Plament and Estatutes towching mencyoninge or in anny wise concernynge religion or opinyons, that is to saie as well the statute made in the first yere of the reigne of the King's noble progenitor Kinge Richarde the Second, and the statute made in the second yere of the reigne of King Henry the Fifthe, and the statute allso made in the xxv<sup>th</sup> yere of the reigne of Kinge Henry theight concerninge punishment and reformaçon of Heretykes and Lolardes, and everie provision therein conteyned, and the statute made for the abolishment of diversitie of opinions in certaine artycles concernynge Christian Religion cōmonlie called the Sixe Articles made in the Plament begonne at Westmestre the xxviii<sup>th</sup> daie of Apryll in the xxxj<sup>th</sup> yere of the reigne of the moste noble and victorious Prynce of moste famous memorie Kinge Henry theight, father to our saide moste drad Sovereigne Lorde the Kinge that now is, and allso the Acte of Plament and statute made at the Plament begoonne at Westmestre the xvj daye of Januarye in the xxxiiij<sup>th</sup> yere of the reigne of the saide late King Henry theight, and after that proroged unto the xxiij<sup>th</sup> daye of Januarye in the xxxiiij<sup>th</sup> yere of the reigne of the saide late King Henry theight, touchinge, mentioninge, or in anny wise concerninge bookes of the Old and New Testament in Englishe, and the pryntinge, utteringe, selling, giving, or delivering of bookes or writings, and reteyninge of Englishe bookes or writings, and reading, preaching, teaching, or expownding of Scripture, or in anny wise touching, mentionynge, or concerninge anny of the same matters: And also one other Statute made in the Plament holden at Westmestre in the xxxv<sup>th</sup> yere of the reigne of the saide late King Henry theight, concerninge the qualificaçon of the Statute of Sixe Articles, and all and everie other Acte or Acts of Plament concerninge doctryne and matters of religion, and all and everie braunche, article, sentence, and matter, paynes, and forfeitures conteyned, mentioned, or in anny wise declared in anny of the same Acts of Plament or



Estatutes, shall from hensfurthe be repealed and utterlie voyde, and of none effecte.”

It was truly observed by Mr. Hannen, that the object of this statute is to repeal laws which inflicted severe punishments and penalties, imprisonment, fine, and death, on account of opinions entertained “concerning doctrine or matters of religion,” such as had been enforced in the reigns of Richard II., Henry V., and Henry VIII., against heretics of various kinds.

If the wider signification which has been contended for be given to this statute, it would in truth repeal the principal statutes enacted during the reign of Henry VIII. for establishing the independence of the Church of England.

It will be difficult to maintain that the statutes against the payments of annates (23 Hen. 8, c. 20), the restraint of appeals (24 Hen. 8, c. 12), and even the Act of Supremacy (25 Hen. 8, c. 19), would not fall under the category of enactments concerning “doctrine or matters of religion;” but in truth the number of statutes which this construction would repeal might amount to forty-two, and certainly would include a great many of grave importance. (1) I remember that Sir W. Maule (one of the members of the Judicial Committee) observed, “that if there were anything in Magna Charta about religion, it would on this construction be repealed.”

I am of opinion that the operation of this statute of Edward VI. must be confined within the limits which I have stated, and that it has not repealed any power to issue Royal injunctions which Henry VIII. derived, either from the supremacy or the proclamation statute.

The legal authority of these injunctions of Edward VI. was discussed in the *Westerton v. Liddell* cases. The judge of the Consistory of London held that the burden of proving their legal authority lay upon those who asserted it, and that the burden had not been discharged, and he treated the injunctions as invalid; and on that ground, among others, decided that the “cross” was not a lawful ornament of the Church.

The Court of Arches, however, held that Edward VI. had power to issue these injunctions under the authority of the Pro-

(1) Perry on Lawful Church Ornaments, App. pp. xi.-xxxv.

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clamation Act, 31 Hen. 8, cap. 8, and the learned judge decided that the cross was an illegal ornament because it was forbidden under the name of an "image" by these very injunctions of Edward VI. When the case of *Westerton v. Liddell* was appealed to the Judicial Committee of the Privy Council, they decided that the cross was a lawful ornament, and that it was not an "image" forbidden by these injunctions. (1)

In arriving at this conclusion they certainly treated the injunctions as valid, whether or not they agreed with Sir John Dodson's opinion that their validity was derived from the powers conferred on the Crown by the Proclamation Act; and referring to the 28th section of these very injunctions, they say, "The section could not mean that all candlesticks should be removed from churches, for two were to be retained" (namely, by the 3rd section) "on the high altar." (2)

If this be so, their decision is binding upon me, and the general question as to the legal validity of these injunctions has been decided in the affirmative. It may be as well, however, to look a little more closely into this question.

It has been argued that these injunctions were not lawfully issued under the Proclamation Act, because it related only to temporal and not to spiritual matters, and also because the orders which it prescribed for the preparation and issue of instruments under its authority were indispensable conditions, and had not been complied with.

Mr. Stephens, in his argument upon this subject, laid down four propositions. First: if these injunctions were issued under the Proclamation Acts, nevertheless, upon the repeal of those acts in November, 1547, they were not in force by the authority of Parliament in the second year of Edward VI. Secondly: if they were intended to be issued under the Proclamation Acts of Henry VIII., they were not issued in accordance with their provisions, first, because there is no time limited during which the injunctions were to continue in force; secondly, because the copies of those injunctions which were printed and circulated were not signed by thirteen members of the King's council, as required by 31 Hen. 8, c. 8, and

(1) Moore's report of the case, 161,  
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(2) Moore's report of the case, 165,  
 166.

there is no evidence of their having been proclaimed in accordance with the 3rd section of that statute. Thirdly, that instead of the punishment by fine and imprisonment which the council, under section 4 of 31 Hen. 8, c. 8, were empowered to inflict, the injunctions of 1547 only threatened ecclesiastical punishments, which the council had no power to inflict under the Proclamation Act; and those ecclesiastical punishments are to be inflicted by the ordinary, and not by the thirteen members of the King's council. Fourthly, it appears from the earliest historians of the Reformation, Fox, Fuller, and Heylin, that the injunctions were not issued under the Proclamation Act, but by virtue of the King's supremacy.

From the first of these propositions I have already expressed my dissent. With regard to the second, I think there is every presumption of law, and that a court of justice must, after this distance of time, act upon that presumption, that these injunctions were signed by the requisite number of members required by this statute, and the absence of a specified time during which the injunctions were to be in force would not, in my opinion, invalidate their validity. As to the objection that they were not duly proclaimed in the market place by the sheriff, the clause which requires this seems to me directory only, and to whatever penalty noncompliance with it might render the sheriff amenable, such noncompliance would not invalidate the injunctions. The contrary position was, indeed, maintained by Bishop Gardner (1) when he was imprisoned for disobedience of these injunctions, which he considered to have been issued under the Proclamation Act. It is remarkable, however, that he does not dispute the power of the Crown to issue the injunctions, nor that the proper number of counsellors had not signed the instrument, but maintains that he ought not to be imprisoned by virtue of the Proclamation Act; and it might be that the injunctions were valid under the Supremacy Act, but that the additional power of secular punishment given by the Proclamation Act could not be put in force against him, and that he was only liable to ecclesiastical punishment under the injunctions. This was probably the opinion of Fox, Fuller, and Heylin, to whom Mr. Stephens referred in his fourth proposition.

I have made these observations upon the Proclamation Act out

(1) Collier's Eccl. Hist. vol. v. p. 199.

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of deference to the argument which was addressed to me; but after all, whether these observations are well founded or not is of small moment, because it seems to me impossible to doubt that these injunctions were recognized by the legislature, not only because they would derive validity from the Supremacy Act, but also because they are specially recognized in the first prayer-book, which is part of the first Statute of Uniformity, in the following words:—"Upon Wednesdays and Fridays the English Litany shall be said or sung in all places after such form as is appointed by the King's Majesty's injunctions, or as is or shall be otherwise appointed by his Highness." (1)

*LA-2834* I should mention, that in the year 1548-49 the Visitation Articles for the diocese of Canterbury in the second year of Edward VI. repeat this injunction in the following inquiry: "Whether they have not . . . destroyed in their churches, chapels, and houses all images, all shrines, coverings of shrines, all tables, candlesticks, trindles or rolls of wax, pictures, paintings, *and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition*, so that there remain no memory of the same in walls, glass windows, or elsewhere;" and also the inquiry: "Whether they suffer any torches, candles, tapers, or any other lights to be in your churches, *but only two lights upon the high altar.*" (2)

Before I leave this subject, let me observe that I cannot find that the legal authority of these injunctions per se was ever seriously questioned before the judgment of Dr. Lushington in the St. Barnabas case. Nor am I aware of any statute—none has been cited to me—by which they have been deprived of their original authority. There were many occasions on which those who were adverse to them would gladly have impugned their original validity, and there was no lack of learned advisers, versed in legal and constitutional lore, to have prompted or maintained such a proposition.

In the interval between 1547 and 1549 no objections whatever appear to have been taken to these injunctions; but in that year a paper appears, the authority of which is extremely questionable;

(1) Liturgical Services, p. 97 (Rubric after the Communion Service).

(2) Cardwell's Doc. Ann. vol. i. pp. 50, 51.



it was unsigned, and the author is unknown: it is headed "Articles to be followed and observed according to the King's Majesty's injunctions and proceedings;" and the second of these articles forbad, among a variety of other things, "setting any light upon the Lord's board at any time." (1)

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It is clear, however, that these articles (perhaps visitation articles, and only binding, like those of Ridley in 1550, if at all, in a particular diocese), cannot affect the question of whether lights were an ornament "in use in this Church of England by authority of Parliament, in the second year of the reign of King Edward the Sixth."

Here I must notice two remarkable letters which throw the light of contemporary history on this subject; the first is a letter written by Martin Bucer and Paul Fagius to the ministers at Strasburgh (2); it is dated April 26, 1549. "We yesterday waited upon the Archbishop of Canterbury, that most benevolent and kind father of the churches and of godly men; who received and entertains us as brethren, not as dependents. The cause of religion as far as appertains to the establishment of doctrines and the definition of rites is pretty near what could be wished."

As soon as the description of the ceremonies now in use shall have been translated into Latin we will send it to you. We hear that some concessions have been made both to a respect for antiquity and to the infirmity of the present age; such, for instance, as the vestments commonly used in the sacrament of the eucharist and the *use of candles*: so also in regard to the commemoration of the dead and the use of chrism; for we know not to what extent or in what sort it prevails. They affirm there is no superstition in these things, and that they are only to be retained for a time, lest the people, not having yet learned Christ, should be deterred by too extensive innovations from embracing his religion, and that rather they may be won over."

The second letter is from John Hooper to Henry Bullinger, 27th December, 1549 (3), at p. 72: "The altars are here in many

(1) Cardwell's Doc. Ann. vol. i. p. 75. (2) Original Letters, p. 535, published by the Parker Society.

(3) Ibid. p. 71.

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churches changed into tables. The public celebration of the Lord's Supper is very far from the order and institution of our Lord. Although it is administered in both kinds, yet in some places the supper is celebrated three times a day. Where they used heretofore to celebrate in the morning the *mass* of the Apostles, they have now the *communion* of the Apostles; where they had the *mass* of the Blessed Virgin, they have now the communion which they call the *communion* of the Virgin; where they had the principal or High Mass, they now have, as they call it, the High Communion. They *still retain their vestments and the candles before the altars.*"

Surely, during the reign of Elizabeth, the legal invalidity of these injunctions would have been urged by those who were adverse to the use of lights.

Bishop Cox, writing to Gualter on February 12, 1571, says of the queen, that she "has always been so exceedingly scrupulous in deviating even in the slightest degree from the laws prescribed." (1) And it is an admitted fact that the two lights were used in her chapel at the celebration of the holy communion. It is no less certain that many of her counsellors, temporal and spiritual, pressed her to discontinue the use of these lights, an object they were most anxious to effect; but in no one single instance did they ever allege to her Majesty that the burning of these lights upon the holy table was contrary to the law. I say this with some confidence, not only because I have been unable to find any instance myself, but because the leading counsel for the promoter, whose industry and whose acquaintance with these subjects no one will gainsay, having been so good, in compliance with my request, as to make search into the authorities upon this point, was unable to find that any such argument had ever been adduced.

The lawfulness of placing these two lights upon the holy table appears to me established by these injunctions, unless they are, as has been contended, by necessary implication abolished, inasmuch as they are significant of a papal superstition, which was rejected by the Church at the time of the Reformation.

To this argument there are various answers.

(1) Zurich Letters, First Series, No. xciv. p. 236.

First. These lights, in their original institution, were not significant of any rejected papal superstition, but of the fundamental truth of Christianity, namely, the light of the gospel. The origin of them in the canon law I will presently refer to.

Secondly. They were suffered to remain because of their strictly evangelical character; they were for the honour of Christ, not of the blessed Virgin or of saints, as lights on bye altars might be.

About the year 376 (A.D.) Vigilantius spoke with derision of the practice of Christians to burn candles during divine service at mid-day. St. Jerome wrote a defence of the Church, and of this practice:—

“Non diffiteor (he says) omnes nos, qui in Christo credimus, de idolatriæ errore venisse, nō enim nascimur, sed renascimur Christiani, et quia quondam colebamus idola, nunc Deum colere nō debemus, ne simili eum videamur cum idolis honore venerari? Illud fiebat idolis, et iccirco detestandum est; hoc fit martyribus, et iccirco recipiendum est nam et absq, martyrum reliquiis per totas orientis ecclesias, quando legendum est evangelium, accenduntur luminaria, jam sole rutilante, non vtiq, ad fugandas tenebras, sed ad signum lætitæ demonstrandum, unde et virgines illæ evangelicæ semper habent accensas lampades suas; et ad apostolos dicitur: *Sint lumbi vestri præcincti, et lucernæ ardentes in manibus vestris.* Et de Joanne Baptista: *Ille erat lucerna ardens, et lucens:* ut sub typo luminis corporalis illa lux ostendatur, de qua in psalterio legimus: *Lucerna pedibus meis verbum tuum Domine, ut lumen semitis meis.*” (1)

Dr. Donne, in his defence of the use of lights in the daytime during divine service, relies much upon the early Christian practice:—

“I would not (he says) be understood to condemn all use of candles by day in divine service, nor all churches that have or do use them, for so I might condemn even the primitive church in her pure and innocent estate. And therefore that which Lactantius, almost three hundred years after Christ, says of those lights, and that which Tertullian, almost a hundred years before Lactantius, says in reprehension thereof, must necessarily be

(1) Hieronym. Stridonensis Opera, Adversus Vigilantium, vol. i. p. 160, (ed. Colon. 1516.)

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understood of the abuse and imitation of the Gentiles therein ; for that the thing itself was in use before either of these times I think admits little question. About Lactantius' time fell the Eliberitan Council, and then the use and the abuse was evident ; for in the 34th canon of that council it is forbidden to set up candles in the churchyard ; and the reason that is added declares the abuse . . . . . that the souls of the faithful departed should not be troubled. Now the setting up of lights could not trouble them, but these lights were accompanied with superstitious invocations, with magical incantations, and with howlings and ejaculations which they had learned from the Gentiles, and with these the souls of the dead were in those times thought to be affected and disquieted. It is in this ceremony of lights, as it is in other ceremonies, they may be good in their institution, and grow ill in their practice. So did many things which the Christian church received from the Gentiles in a harmless innocence degenerate afterwards into as pestilent superstition there as amongst the Gentiles themselves. For ceremonies which were received but for the instruction and edification of the weaker sort of people were made real parts of the service of God and meritorious sacrifices. To those ceremonies, which were received as helps to excite and awaken devotion, was attributed an operation and an effectual power, even to the ceremony itself, and they were not practised, as they should, *significative* but *effective*, not as things which should signify to the people higher mysteries, but as things as powerful and effectual in themselves as the greatest mysteries of all, the sacraments themselves. So lights were received in the primitive church to signify to the people that God the Father of lights was otherwise present in that place than in any other ; and then men came to offer lights by way of sacrifice to God ; and so that which was providentially intended for man, who indeed needed such helps, was turned upon God, as though he were to be supplied by us. But what then ? Because things good in their institution may be depraved in their practice . . . . . shall therefore the people be denied all ceremonies for the assistance of their weakness ? . . . . . We must not be hasty in condemning particular ceremonies, for in so doing, in this ceremony of lights, we may condemn the primitive church that did use them, and we



condemn a great and noble part of the reformed church which doth use them at this day." (1)

Thirdly, as to the averment that the words "before the sacrament" denote the *reserved sacrament*.

The practice of reserving the holy sacrament, it has been truly said, is unlawful according to the present law of the Church of England.

In the office for the communion of the sick in the prayer-book of Edward VI., it is provided by the prefatory rubric as follows:—"And if the same day there be a celebration of the holy communion in the church, then shall the priest reserve (at the open communion) so much of the sacrament of the body and blood as shall serve the sick person, and so many as shall communicate with him (if there be any); and so soon as he conveniently may, after the open communion ended in the church, shall go and minister the same, first, to those that are appointed to communicate with the sick (if there be any), and last of all to the sick person himself. (2)

In the present prayer-book it is ordered: "And if any of the

(1) Dr. Donne's Sermons, folio, p. 80 (1640); octavo, vol. i. p. 15.

Luther allowed the use of these lights—see his Deutsche Messe (Codex Liturgicus, vol. ii. p. 97)—

"*Des Sonntags für die leyen.*"

(Ibid. p. 108.)

Da lassen wyr die Messegewand, altar, liechter noch bleyben, bis sie alle werden, oder uns gesellet zu endern, wer aber hie anders vil faren, lassen wyr geschehen.

Editor's note.—Gerberus, c. l. p. 459: "Die lichter oder wacks-keitzen, die wir bey der handlung des heiligen nachtmals anzünden, sind auch unter die ceremonien zu rechnen." Page 132: "Auch sollen die gewonlichen liechter, zu den bovis, messen, und andern empton, auch sonst des winters zur nothinfte gebrand werden, was aber darüber sonst sonderliche liechter des sonderschaften und gülden, oder entzeler personen verhanden, solien abgethan, und was etwan darauff gewand sol nach befelch der visitation zu beserm brauch gefurt werden.

"*Wie man die krancken communiciren sol.*"

Editor's note, p. 432:—"In deme also de Pfarrhere solckes, also hyr vör hür steit, mit dem volcke, unde mit dem krancken rëdet, let ne dorch den cöstes, de alle wëge mit gan schal, bereiden einen disch, mit brodt unde wyn, mit einem reinen doke bedecket, unde bereidet das up dat brodt in der patene, den wyn in dem ketke, &c." Page 3, 563: "Multi alii libri mentionem faciunt candelarum in celebratione sacramenti accendendarum." Gerberus, p. 487: "Es sind aber die ceremonien bey communion derer patienten nicht allenthalben einerley. An manchen orten werden noch 2 lichter angezündet und auf den tisch gesetzt, auch ein crucifix dazu, andere aber lassen diese dinge weg, und achten sie nicht, wie si denn auch nicht nöthig seyn."

(2) Liturgical Services, p. 141. Ed. Camb. 1844.

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bread and wine remain unconsecrated, the curate shall have it to his own use; but if any remain of that which was consecrated, it shall not be carried out of the church, but the priest, and such other of the communicants as he shall then call unto him, shall, immediately after the blessing, reverently eat and drink the same.”

The light which burnt before the reserved sacrament was generally a lamp.

This light was continually burning, and therefore probably oil was used, whereas these two lights were only burning during the celebration.

The lights before the reserved sacrament appear to have been always of an uneven number when the light was not, as it usually was, single.

The lights “before the sacrament” in England were necessarily, for mystical reasons, or more properly fancies, enumerated by Lyndewode, but which it is not necessary to recapitulate here, made of wax.

The words “before the sacrament” are omitted in Cranmer’s Visitation Articles intended to execute the injunction, but that clearly means “tempore quo missarum solennia peraguntur,” while the ceremony was being performed. The candles might be lighted before the elements have been consecrated, and before the sacrament is therefore complete, “accedit verbum elemento et fit sacramentum,” as Saint Augustine says, but they are not the less burning before it when it is complete.

The reserved sacrament was not, in the time when Lyndewode wrote his Commentary (in 1430) placed upon the “high altar.” It was one of the usages peculiar to the Church of England to suspend the reserved sacrament above the altar.

The account given by Lyndewode clearly shows that *two wax* candles (the number and the quality it is important to notice) ought properly to accompany every celebration of the mass, because Christ is the splendour of eternal light.

In a constitution of Archbishop Walter, under the following title (1), “Sacerdos curet, ut omnia Eucharistiæ deservientia sint integra et munda, atque verba consecrationis debite pronunciet; nec celebret antequam matutinas primam et tertiam perlegerit, nec

(1) Lyndwood, p. 235.

sine clerico superpellicio induto, nec sine lumine, nec in peccato mortali," we find this order :

*Lyndwood*, p. 236, *Walterus*.—"Nullus insuper sacerdos parochialis præsumat missam celebrare, antequam matutinale persolverit officium, et primam et tertiam de die. Item nullus clericus permittatur ministrare in officio altaris, nisi indutus sit superpellicio, et tempore quo missarum solennia peraguntur, accendentur (n) duæ candelæ, vel ad minus una."

Upon this constitution the gloss of *Lyndwood* is as follows: (n) *Duæ candelæ*.—"Est enim a parte juris ordinatum quod sacerdos sine lumine ignis non celebret missam. (*Extra eo c. ult. ubi de hoc.*) Si tamen faciat, nihilominus conficit, licet graviter peccet, secundum *Hostien.* ibi, et concordant alii doctores. Et nota, quod candelas in celebratione missæ arsuras convenit esse de cerâ potius quam de aliâ materiâ. *Candela namque sic ardens significat ipsum Christum, qui est splendor lucis æternæ.*" (*Extra eo. c. sane.*) (1)

The Devonshire rebels, when in 1549 they demanded the restoration of Roman Catholic rites, drew up a series of articles in which their grievances were stated. They said in the 4th article:

"We will have the sacrament hang over the high altar, and there to be worshipped, as it was wont to be; and they which will not thereto consent, we will have them die like heretics against the holy Catholic faith."

The answer of Cranmer is very remarkable:

"Is this the holy Catholic faith, that the sacrament should be hanged over the altar and worshipped? and be they heretics that will not consent thereto . . . . Innocent III., about 1215 years after Christ, did ordain that the sacrament and chrism should be kept under lock and key. But yet no motion he made of hanging the sacrament over the high altar, nor of the worshipping of it.

(1) Unde et candela in sui compositione significat Christum propter tria; componitur namque candela ex cera, lychno, et lumine. Sic quoque Christus constat ex carne virginea sine semine generatus, sicut procedit cera ex ape sine generatione vel coitu apis. Lychnus, qui est candidus, significat in

Christo animam candore innocentiae adornatam. Lumen vero significat ejus divinitatem carni unitam. De his sic dicitur Cantic. 5: "Dilectus meus candidus propter animam candidam et rubicundus propter divinitatem fulgidam. Electus ex milibus propter carnem sine peccato genitam."

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After him came Honorius III., and he added further, commanding that the sacrament should be devoutly kept in a clean place, and sealed, and that the priest should often teach the people reverently to bow down to the host when it is lifted up in the mass time, and when the priest should carry it to the sick folks. And although this Honorius added the worshipping of the sacrament, yet he made no mention of the hanging thereof over the high altar as your article propoerteth. Nor how long after, or by what means, that came first up into this realm, I think no man can tell. And in Italy it is not yet used until this day." (1)

The inference to be drawn from this letter is, that the two lights ordered by the injunctions of 1547, and which Cranmer had enforced by his Visitation Article in 1548, could not have been placed before the reserved sacrament, inasmuch as the complaint of the rebels in 1549 is that the sacrament was not suspended over or placed upon the high altar. It is remarkable that Dr. Rock, whose knowledge as an antiquarian in the matter of Church rites and ceremonies is supposed to be considerable (2), says, "that the first wooden or stone tabernacle resting on the altar seen in this land was put up in Queen Mary's reign."

It appears from Lyndewode's gloss upon the Provincial Constitution of John of Peccham, that according to the English custom the reserved eucharist was placed in a *pyx*, and the *pyx* in a *tabernaculum*, and the tabernaculum, instead of being placed stationary, as it afterwards was in conformity with later Roman usage, upon the altar, was hung up over it. And in support of Dr. Rock's assertion that in Queen Mary's reign the reserved sacrament was placed upon the altar is the inquiry of Cardinal Pole in 1557, "Whether they do burn a lamp or a candle before the sacrament?" and referring to his injunctions in 1566, this would appear to have been "a tabernacle set in the midst of the high altar."

With respect to the custom of the Greek Church, Goar says:—

"A lamp, kept perpetually burning, is suspended in such a manner as to hang between the altar and the place for the blessed sacrament, and is regarded by the Greeks as a becoming token of reverence towards the Word of God inscribed within the sacred

(1) Strype's Cranmer, App. 97.

(2) "The Church of our Fathers," by Dr. Rock, vol. iii, part ii, p. 208.



volume, and the Word made flesh, Christ Jesus dwelling with us, but veiled under the appearance of the sacramental species." (1)

I was referred by Mr. Prideaux to a treatise in French upon the exposition of the holy sacrament of the altar. It was published in 1673, and the account which the author, a Roman Catholic, of course, gives of the practice as to the reserved sacrament, the importance especially of having a lamp perpetually burning before it, is interesting, and bears upon the subject now under consideration. "Néanmoins," (says this author) "on ne se met pas en peine comment la tres-sainte euchariste est logée dans les Eglises de la campagne, ny comment elle est portée aux malades, dans presque tous les villages, où elle y est portée dans un si pauvre appareil, qu'il est plutost capable d'exciter de la douleur et de l'indignation dans le cœur des veritables fideles, que de la devotion et du respect. La plupart de ces Eglises sont ou désolées, ou decouvertes, ou sans lambris, ou sans vitres, ou sans luminaires, ou sans livres, ou enfin destituées sans ornements necessaires pour celebrer dignement les saints mystères, et les divins offices. Leurs vaisseaux sacrez ne sont que d'estain, ou de cuivre, ou mesme de plomb en quelques endroits; leurs tabernacles, sont ou rompus, ou difformés, ou mal-ornez; ou enfin leurs fabriques *n'ont point de revenu pour entretenir une lampe toujours ardente devant le Sanctuaire où repose l'Eucharistie.* Et l'on fait tous les jours de grandes depenses dans les villes pour l'exposition frequente de ce divin mystere." The author regrets this expense, and continues: "Ne vaudroit-il pas mieux les employer à la decoration, ou aux reparations des eglises de la campagne, et à l'achat des vaisseaux sacrez, des livres, des meubles et des ornements dont elles ont si grand besoin? N'a-ce pas esté l'intention de Paul III. qu'elles y fussent employées, comme on le peut voir par les paroles de sa bulle que nous avons rapportées?" (2)

It is surely most improbable that Cranmer, who was advancing tentatively in the path of reform, and who was the real author of the injunctions, should have ordered two lights to be continued perpetually burning before the reserved sacrament, having regard to his desire to abrogate the custom of reservation, and also on

(1) Goar's Euchal. Græc, p. 15; Hierurgia, p. 507.

(2) Traité de l'Exposition du St. Sacrament de l'Autel, p. 171 (ed. 1673).

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|              |                                                                                                                                                                                                               |
|--------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1868         | account of the expense which the ordering would have entailed upon the parishioners.                                                                                                                          |
| MARTIN       |                                                                                                                                                                                                               |
| "            |                                                                                                                                                                                                               |
| MACDONOCHIE. | Gavanto (vol. v. p. 65), writing in Italy his "Praxis Compendaria Visitationis Episcopalis," and describing the duties of the bishop on his visitation, under the heading "De Sanctissima Eucharistiâ," says: |
| FLAMANK      |                                                                                                                                                                                                               |
| "            |                                                                                                                                                                                                               |
| SIMPSON.     |                                                                                                                                                                                                               |

"Observet Episcopus, et Notarius describat, an sint, qualia sint, quæ sequuntur;" and among these articles is to be found "Basim Tabernaculi vacuum" and "Lampadem ardentem," which is clearly the one lamp before the reserved sacrament.

Symbolism and the worship of symbols are distinct things, "is confirmat usum qui tollit abusum."

I am disposed to assent to the opinion expressed by Mr. Stephens in his elaborate and useful edition of the Book of Common Prayer.

"It may, however," that learned person says, "be argued that a distinction is to be taken between, first, the lights burning before shrines and images; second, the symbolical lights formerly placed on the altar during the communion; and third, those which are for actual use for the decent enlightenment of the house of God. The lights mentioned in King Edward's injunctions are not to be confounded with the lamp or cresset, a single light, burning before the suspended pyx. King Edward's mention of the sacrament appears to be merely circumstantial: *two* lights (which are known to be of wax, not *one* lamp), were to be on the altar before the sacrament or pyx, 'for the signification that Christ is the very true light of the world.' The pyx was then considered to contain the actual body of Christ. The removal of the pyx, in consequence of the purified doctrine of the Church, did not weaken the force or propriety of the symbol, as Christ is spiritually present in his own house. It is to be remarked that Archbishop Cranmer omits the words 'before the sacrament.'" (1)

The usages with respect to the custody of the reserved sacrament appear then to have been these:

(1) The use which Lyndewode refers to as existing in Holland, Portugal, and other places, and which apparently existed too in Italy of keeping it in a place in the wall under lock and key:

(1) Book of Common Prayer, vol. ii. same opinion on this point: see his p. 1120. Dr. Hook seems to be of the Church Dictionary, article "Lights."

(2) The peculiar English custom of suspending it in a pyx in a tabernaculum *over* the high altar :

(3) Cardinal Pole's order in Queen Mary's time, that it should be placed *upon* the altar.

In *Westerton v. Liddell*, Dr. Lushington came, apparently not without reluctance, to the conclusion that candlesticks upon the holy table were lawful ornaments.

It seems to me difficult to suppose that the use of candlesticks does not bear witness to the partial retention—no uncommon fact in the history of ritual observances—of the custom of burning lights upon the altar, embodied in the earliest usages of the Church in the provincial constitutions of our own country, and in the Injunction of 1547. (1)

I should not omit to notice the argument, much referred to by counsel, from the inventories made by order of the Government of Edward the Sixth, in order to stop the wholesale sacrilege and plunder of the furniture and goods of parish churches by those who humbly imitated the rapine which, on a large scale, had been carried on by the courtiers, out of their zeal for the reformed religion.

I am not inclined to rely very much, on the one hand, upon the fact that certain ornaments are proved by these inventories to be *de facto* in existence after the second year of Edward the Sixth, nor, on the other hand, that only certain of these ornaments were retained, by the commissioners who caused these inventories, for the use of parish churches.

However, the fact is not to be laid wholly out of consideration that two or three years after the date of the first prayer-book there should be in twenty-one counties no less than 1400 churches which possessed each two candlesticks. Such is the result I believe of an investigation of the inventories in the Record Office, which were taken in 1552, when the second prayer-book was in course of preparation.

Inasmuch, therefore, as I think that the injunctions which order

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(1) It is true that candlesticks possess, as Archdeacon Freeman observes (*Rites and Ritual*, p. 76), a symbolism of their own, and that St. John saw in

his vision "golden candlesticks," not burning candles or lamps (*St. John*, v. 35; *Rev.* v. 8; viii. 3).

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these two lights were issued under statutable authority, and have not been directly repealed by the like authority; inasmuch as they are not emblematical of any rite or ceremony rejected by our church at the time of the Reformation, inasmuch as they are primitive and catholic in their origin, evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the Church, I am of opinion that it is lawful to place two lighted candles on the holy table during the time of the holy communion "for the signification that Christ is the very true light of the world."

Conclusion.

These are the conclusions at which I have arrived, and this is the judgment which I am about, in formal language, to pronounce, after a most anxious, painful, and I may be allowed to add, conscientious, however inadequate, examination of the law applicable to the facts of the case. I have not been able to conceal from myself that this exposition of the law may wound the feelings of some whose love for the Church of Christ is as unquestionable as their loyalty to the Church of England—men who think no ornament too costly, no service too magnificent, for the house of God—capable of any act of self-denial and self-sacrifice to promote these objects,—to whom it may at first appear harsh and illiberal to be told that the sentence of the law bids them forego any symbolical act, or incident of divine worship, with which they have accustomed themselves to associate in any way the administration of the blessed sacrament of the body and blood of our Lord; but I have good hope that further and deeper consideration will convince them of the truth of the proposition which I stated at the outset of my judgment, that no matter of doctrine or faith is affected by this decision, the true result of which is simply to pronounce, that by those statutes, ordinances, and canons which form the compact of union between the Church and the State in this country, it has been determined that certain usages, however in themselves innocent, laudable, and primitive, shall, for the sake of general peace and harmony, form no part of the rites and ceremonies of the Church of England.

In *Westerton v. Liddell*, the Privy Council said: "Their lordships are not disposed in any case to restrict within narrower limits than



the law has imposed, the discretion which within those limits is justly allowed to congregations by the rules both of the ecclesiastical and the common law courts."

The basis of the religious establishment in this realm was, I am satisfied, intended by the constitution and the law to be broad, and not narrow. Within its walls there is room, if they would cease from litigation, for both parties; for that which is represented by the promoter, and for that which is represented by the defendant; for those whose devotion is so supported by simple faith and fervent piety that they derive no aid from external ceremony or ornament, and who think that these things degrade and obscure religion; and for those who think with Burke, that religion "should be performed, as all public solemn acts are performed, in buildings, in music, in decorations, in speech, in the dignity of persons according to the customs of mankind taught by their nature, that is, with modest splendour and unassuming state, with mild majesty and sober pomp;" who sympathize with Milton the poet rather than with Milton the Puritan, and who say that these accessories of religious rites

. . . . . "dissolve them into ecstasies,  
And bring all heaven before their eyes."

Saint Chrysostom and Saint Augustine represented different schools of religious thought; the Primitive Church held them both. Bishop Taylor and Archbishop Leighton differed as to ceremonial observances, but they prayed for the good estate of the same Catholic Church; they held the same faith "in the unity of spirit, in the bond of peace, and in righteousness of life;" and the English Church contained them both.

There is surely room for both the promoter and the defendant in this Church of England, and I should indeed regret if, with any justice, it could be said that this judgment had the slightest tendency either to injure the catholic foundations upon which our church rests, or to abridge the liberty which the law has so wisely accorded to her ministers and her congregations.

I must say a word as to costs. This is a matter to be governed by the discretion of the Court, that is, by a discretion judicially exercised.

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In the case of *Martin v. Mackonochie* it appears that the promoter is not a churchwarden, nor a resident parishioner. Of the five charges brought against Mr. Mackonochie, in which I include the excessive kneeling, upon three there have been adverse decisions to Mr. Mackonochie. With respect to the *elevation*, Mr. Mackonochie submitted the question to his ordinary, and discontinued, under his direction, the practice before the institution of this suit, though, it is true, he has done so under protest.

With respect to the *incense*, he had discontinued, though also under protest, the censuring of persons and things before the institution of this suit.

With respect to the *excessive kneeling*, I have decided that it was a matter that ought to have been referred to the discretion of the ordinary. //

With respect to the *mixing water with the wine*, the decision is in favour of the promoter; and with respect to the *lights*, in favour of the defendant. //

Taking all the circumstances into my consideration, I shall make no order as to costs in this case. //

In the other case of *Flamank v. Simpson*, the circumstances are materially different. Mr. Flamank is a churchwarden, and Mr. Simpson does not appear to have submitted to the control of his ordinary any of the practices for which he has been articulated in this court. Upon the question of *lights* the decision is in his favour, and another of the charges was abandoned at the hearing. No expense has been incurred by the examination of any witnesses, and I think I shall, upon the whole, do justice by condemning Mr. Simpson in a sum of 80*l.* nomine expensarum.

I admonish Mr. Mackonochie to abstain for the future from the use of incense, and from the mixing water with the wine, as pleaded in these articles; and I further admonish him not to recur to the practices which he has abandoned under protest, with respect to the elevation of the blessed sacrament, and the censuring of persons and things.

I admonish Mr. Simpson to abstain for the future from the elevation of the blessed sacrament, from mixing water with the

(1) Read by PC a, b then 2 PC, 305.

wine, and from placing the alms upon a stool, as pleaded in these articles.

Proctors for Mr. Martin: *Moore & Currey.*

Proctors for Mr. Flamank: *Tebbs & Sons.*

Proctor for defendants: *G. H. Brooks.*

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### THE BISHOP OF WINCHESTER v. RUGG.

May 2.

*Two Churches in One Benefice—Duty of Incumbent—13 & 14 Car. 2, c. 4.*

It is not competent to a clerk in holy orders, having two churches in one benefice, to perform divine service in one only at his own discretion: it is his duty to perform a service every Sunday in each church.

*affd 20 R 2 PC. 223.*  
This was a cause instituted in this Court by reason of letters of request from the Bishop of Winchester, under the provisions of the Clergy Discipline Act (3 & 4 Vict. c. 86). The Bishop of Winchester was the promoter of the office of judge. The defendant was the Rev. Lewis Rugg, a beneficed clerk in the diocese of Winchester. The object of the suit was to compel Mr. Rugg, the incumbent of Ecchinswell-with-Sydmonton, to perform divine service every Sunday in the church of Sydmonton.

Mr. Rugg was, in September, 1852, licensed to be the perpetual curate and incumbent of the perpetual curacy and benefice of Ecchinswell-with-Sydmonton, in the county of Southampton, and diocese of Winchester.

The benefice consists of two ancient parochial chapelries now and for many years past known by the respective names of Ecchinswell and Sydmonton, in each of which there is a church. These chapelries up to the 18th day of August, 1852, belonged for all ecclesiastical purposes to the vicarage and parish church of Kingsclere, but were separated therefrom by an order in council of the 18th day of August, 1852, and since that date have been a separate parish for ecclesiastical purposes, and a perpetual curacy and benefice by the name of the perpetual curacy of Ecchinswell-with-Sydmonton.

Mr. Rugg had within the two years last past on many Sundays

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omitted to perform, or to provide for the performance of public divine worship, and administration of the sacraments in the church at Sydmonton. On those days he had duly performed divine service in the church at Ecchinswell. The Bishop of Winchester directed Mr. Rugg to hold services at Sydmonton, but Mr. Rugg neglected to do so.

The substantial defence raised by Mr. Rugg was, that where an incumbent has a parish consisting of two benefices with a church in each, he is not bound to perform divine service in both churches, but may perform service in one only, at his own discretion, and that the bishop has no voice in the matter. Mr. Rugg offered some evidence to shew that the church at Sydmonton was not duly consecrated, that it was not sufficiently endowed to enable him to provide a curate to perform service there, and that the church stood on private ground, and had no right of way leading to it; and he contended that on these grounds also he was not bound to perform service at Sydmonton. This evidence, so far as it is material, is sufficiently stated in the judgment.

*Dr. Deane, Q.C.*, and *Dr. Swabey*, for the promoter, argued that a clergyman having two churches in one benefice has no right, of his own mere motion, to discontinue the services in one of them.

*Mr. Rugg*, the defendant, appeared in person.

*Dr. Deane, Q.C.*, replied.

*Cur. adv. vult.*

May 2. SIR ROBERT PHILLIMORE. It is not necessary to consider the question whether or no previously to August, 1865, the old church, which occupied the site of the present church, built in 1853, had been consecrated or not. The order in council, which dates from the 18th of August, 1852, severs the chapelries of Ecchinswell and Sydmonton from the vicarage and parish church of Kingsclere, and forms them "into a separate parish for ecclesiastical purposes, and a perpetual curacy and benefice, by the name and style of the Perpetual Curacy of Ecchinswell-with-Sydmonton." The same order recites: "that there is in each of the said chapelries a church or chapel, that of Ecchinswell being nearly two miles, and that of



Sydmonton being about three miles distant from the parish church of Kingsclere." It further recites: "that each of the chapelries has its own churchwardens; that the tithe rent-charge of Ecchinswell was commuted at 60*l.*, and that of Sydmonton at 50*l.* 8*s.* 6*d.*, and that the fees of both chapelries were 2*l.*" These recitals in the order in council furnish evidence which the Court is bound to accept so far as they affect the question now before it. Mr. Rugg was, in September, 1852, instituted as incumbent of Ecchinswell-with-Sydmonton. Mr. Kingsmill, the principal owner of land in the parish, rebuilt the chapel at Sydmonton in 1853. It appears from a pamphlet printed by Mr. Rugg, which has been admitted as evidence in this cause, that for twelve years divine service was performed by him at Sydmonton. That in 1863 he had an unfortunate quarrel with Mr. Kingsmill about sittings in the chapel, and Mr. Rugg says: "I was thereupon put to the necessity of suspending divine service until my wishes were respected." On the 5th of September, 1863, he wrote to Mr. Kingsmill, complaining of his conduct "in intimidating, as you have done, the inmates of my house from sitting in the pew which was appropriated to my household at the vestry meeting held prior to the opening of my church. I think, indeed," he adds, "it is high time the church should be closed, when it has come to such a pass as this, coupled with the conduct which has generally been characterized with so much injustice towards your pastor. You cannot, I am sure, spiritually benefit by the services therein performed, nor, as far as your influence is permitted to operate, can it be otherwise than detrimental to the bearing of religion on the hearts of other worshippers." The Court much regrets to discover from this letter that a priest of the Church of England should suppose that he was justified, on account of a dispute about a pew or sitting in church with a particular person, to refuse the administration of spiritual services to a parish, and actually to close his church. It is clear that such an act was illegal as well as wrong. The quarrel seems to have been made up for a short time, for on the 7th of September, Mr. Rugg wrote to Mr. Kingsmill: "I hope to resume the duty at Sydmonton next Sunday, and sincerely regretting as I do that any disturbance should have arisen from so trivial a matter, I remain, &c." On the 17th of December the bishop wrote to Mr.

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Rugg, enclosing a letter from one of the churchwardens of Sydmonton, complaining of Mr. Rugg, that on various Sundays there was no service at Sydmonton; that Mr. Rugg said he was not well or strong enough sometimes to perform service; and the writer adds: "he says he is not compelled to take the service of Sydmonton, because the church was not consecrated when rebuilt." That is in 1853. On the 21st of December Mr. Rugg wrote a long answer to the bishop, in which he maintained that as the church was not consecrated, he was not legally bound to perform service in it, and observes that: "the portion of the endowment, as regards Sydmonton, does not amount, after the outgoings, to more than 20*l.* a year." A further correspondence ensued between Mr. Rugg and the bishop, in which the former maintained that he was not bound to officiate in an unconsecrated church. Early in August, 1865, Mr. Rugg received notice that the bishop intended to consecrate the chapel. Mr. Rugg declared that he would not consent to the consecration, and refused the use of his key for the purpose of opening the door of the church. The bishop, however, proceeded to perform his duty, and consecrated the church on the 17th of August, 1865. Mr. Rugg maintains that this consecration had no legal effect, and admits he has performed no divine service at Sydmonton on the days laid in the articles, and, as I understand him, for a whole year, dating from the present month. There is no difficulty in deciding that this part of Mr. Rugg's defence is untenable and bad. I have no doubt at all that the church was duly and legally consecrated; that Mr. Rugg, by withholding his consent, in no way affected the legal validity of the act. It is not necessary that I should again advert to the order in council; but I listened with surprise to Mr. Rugg's assertion that Sydmonton was unendowed, whereas it is plain that he derives nearly as much income from it as from Ecchinswell. However, the question of the validity of this consecration has been determined by the Privy Council, whose decision is binding upon me. It happened that the consistory of Winchester granted a faculty to Mr. Kingsmill for a vault under the chancel of this chapel. Mr. Rugg opposed this grant, and appealed to the Privy Council from the sentence of the Court of Arches confirming this grant: *Rugg v. Kingsmill*. (1)

The Privy Council decided not only in express terms, but by their act, so to speak, that this church was consecrated, for they granted the faculty under conditions to Mr. Kingsmill. (1) Those conditions related to a further consecration of ground adjoining the chapel. It is needless, however, to say to any person acquainted with ecclesiastical law that a faculty cannot be granted for a vault in an unconsecrated building.

As to the objection raised by Mr. Rugg, that there is no right of way to this chapel, and that therefore he is excused from performing service therein—to pass over the fact that this objection is not sustained by any evidence, but is clearly an after-thought to support Mr. Rugg's resolution, taken upon other grounds, not to perform service in this chapel—the law seems to me clear, that if there is no access to this chapel except through the land of Mr. Kingsmill, that there must be what is called “a way of necessity” over the land of Mr. Kingsmill to this chapel, which is a public building, to which all the parishioners of Sydmonton have a right to resort.

The only question as to which there really can be anything like a serious argument in this case arises out of the second branch of Mr. Rugg's defence, which, briefly stated, is, that in the case of an incumbent having a parish consisting of two benefices with a chapel or church in each, it is competent to the incumbent to perform service in one of these churches or chapels alone; and that, by so doing, he satisfies the requisitions of the Act of Uniformity, and of the general ecclesiastical law; that a discretion as to this matter is vested in the incumbent, and not in the bishop; that the parishioners of Sydmonton, whatever may be said in the order of council, have no right or title to have divine service performed at all in this chapel. The consequence, I may observe, of this position would be that they would be altogether deprived of their strict right to attend divine service, for if the accommodation of Ecchinswell be only sufficient for the parishioners of that chapelry, the parishioners of Sydmonton have certainly no legal right to sittings in the church of Ecchinswell. Another consequence would be, that if Mr. Rugg chose to shut up the chapel of Ecchinswell, wherein the majority of the parishioners reside, and perform service in Sydmonton alone, it would be competent to him to do so.

(1) Law Rep. 2 P. C. C. 59.

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It is not denied that by the existing law Mr. Rugg is compellable to perform morning and evening service in his parish, according to the Act of Uniformity, 13 & 14 Car. 2, c. 4, s. 2. According to the provisions in 1 & 2 Vict. c. 106, s. 80, the bishop may order two full services, including a sermon or lecture, to be performed on every Sunday throughout the year, in the church or chapel of every or any benefice within his diocese. But in this case the exercise of his discretion is restrained by the conditions relative to the value of the living and the number of the population. But no such restriction is imposed upon the authority of the bishop to compel the performance of two services in each chapel of a parish. The 17 Car. 2, c. 3, s. 1, par. 4, was cited by Mr. Rugg. But in the first place, the statute applies only to a very particular class of churches, namely, those in cities and towns corporate; and, in the second place, the principle of the act is directly opposed to Mr. Rugg's argument, for the discretion as to the performance of divine service is expressly vested in the bishop, and not in the minister. There are in this kingdom many parishes which contain united benefices, with a church in each, and it is, I believe, for the very first time that it has been contended by the incumbent of such a parish that it is competent to him to perform divine service in one of those chapels only, and that the inhabitants of the district in which the other church is situated may be deprived of the right, equally recognized by the common and by the ecclesiastical law of this realm, to the performance of divine service by their minister in their own church. To whom are these parishioners to look for redress for this wrong done to them? How are they to obtain the performance of divine service in their church? Surely, by an appeal to the authority of their bishop. He has the *cura curarum animarum* within his diocese. It is his bounden duty to enforce, in every church within his diocese, the performance of the services prescribed in the Book of Common Prayer; and where the circumstances of the parish are unfortunately such as not to furnish the means of performing full divine service in both churches of a united parish, it is, in my opinion, clearly the intendment of the law, ancient and modern, common and ecclesiastical, as well as of the particular order in council under which these parishes were united, that a service should be performed every Sunday in each



church, so that the inhabitants of both parishes should have access, upon this holy day, at least, to their respective churches, and receive the benefit of the ministrations of the church, according to such a distribution of the duty of the incumbent as may best secure this object, that is, according to the opinion of the bishop in this case, by alternate morning and evening services in the two churches. I see no reason to doubt that the general authority of the ordinary in matters of this kind, recognized by the universal ecclesiastical law as inherent in the nature of his office, and necessary for the performance of the duties which are cast upon him, is properly applied to a case of this kind.

I think that the parishioners of Sydmonton are entitled to the performance of a service by their minister in their church every Sunday; that the bishop has rightly exercised his discretion in commanding Mr. Rugg to perform this service; and I must formally admonish Mr. Rugg, as I now do, to obey the direction of his ordinary.

It is right that I should call the serious attention of Mr. Rugg to the order of this Court. I am glad to perceive that he has the assistance of an experienced proctor, from whom he may learn, if not otherwise informed, that a disobedience to the order of this Court will be attended with the grave penal consequences which the law attaches to the offence of contumacy.

I must further, in the execution of my duty, condemn Mr. Rugg in all the costs of these proceedings.

Proctors for promoter: *Moore & Currey.*

Proctor for defendant: *Brooks.*

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April 21.

## THE LIZZIE.

*Bottomry—Duty of Master to communicate with Owner of Cargo before hypothecating.*

The *Lizzie* sailed from Minatitlan, Jan. 1866, with a cargo of mahogany and cedar, for the United Kingdom. Having suffered sea damage, she put into Key West, Feb. 27, and there properly underwent some necessary repairs which detained her until May 21. The master, not being able to raise money on personal security to defray the expenses of the repairs, gave a bottomry bond, dated the 19th of May, on the ship, freight, and cargo.

The master, before hypothecating, did not communicate with the owner or consignees of the cargo by reason of the great delay and uncertainty in the transmission of letters from Key West at that time. The vessel sailed on the 21st of May, and arrived at her port of destination on the 2nd of July.

A suit having been instituted against the vessel, her freight, and cargo, by the holders of the bottomry bond, the validity of which was contested by the consignees of the cargo :—

*Held*, that under the circumstances, the master was not bound to communicate with the consignees before hypothecating, and that the bond was therefore binding upon the cargo.

**BOTTOMRY.** This cause was instituted by Messrs. Maxwell & Co., of Liverpool, the holders of a bottomry bond, granted by the master of the *Lizzie* upon ship, freight, and cargo. The cause went by default against ship and freight, but the consignees of the cargo appeared and contested the validity of the bond.

*Milward, Q.C.*, and *Lushington*, appeared for the plaintiffs.

*Butt* and *Benjamin* for the defendants.

The circumstances of the case, and the evidence given, are fully stated in the following judgment :—

**SIR ROBERT PHILLIMORE.** The *Lizzie*, a brig belonging to the port of Cardiff, sailed under a charterparty, dated Liverpool, the 15th of July, 1865, by which it was agreed between the owner, George Noel, and Daniel Price, of Minatitlan, merchant, that the vessel should, after discharge of outward cargo, proceed to Minatitlan, in the river Goatzocoalcos, where she was to receive a cargo of mahogany and (or) cedar, and proceed with it to Queenstown or Falmouth, for orders to discharge in a safe port in the United Kingdom, and deliver the same to the charterers, on payment of freight. The

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P.C 226*

*A. 8.41.*

brig was lying at Minatitlan early in the month of January, 1866, and it appears from the bill of lading, dated the 23rd of January, that Daniel Price shipped on board of her that day a cargo of mahogany, cedar, and fustic, to be carried from Minatitlan to Queenstown or Falmouth, and delivered at the port of discharge to Messrs. Graham & Co., or their assigns. The *Lizzie* sailed from Minatitlan on the 25th of January. On the 29th of January, going down the river Goatzocoalcos, she got upon a bank, but does not appear at the time to have received much injury. On the 30th of January, when she came to the entrance of the river, her crew became sick; and when she got out to sea, the captain says she began "to make a deal of water." On the 23rd of February she arrived at Key West; her crew were exhausted, and it became necessary to place them in the hospital, and to ship a fresh crew. While she was outside the mole at Key West, she suffered from a hurricane for three days, during which period the vessel made more water. On the day after the hurricane the captain went on shore; and on the 26th of February a survey of the ship was made by a shipmaster and two ship's carpenters, who reported that, after a careful examination, they found her making three inches of water while lying in the harbour, and they recommended that her cargo should be discharged for further examination.

At that time there was no estimate of the cost of the necessary repairs; and a delay occurred between the date of the survey and the time when the brig could be put upon the slip, which was on the 26th of April. The cause of the delay was that the slip was occupied, in this small and inconsiderable place, by another ship, which was expected to be detained for only five days, but which was detained there for five weeks. No blame whatever appears to attach to the captain on account of this delay.

On the 26th of April a second survey was made, the result of which was that, owing to the chafing of her metal in a number of places, and the general opening of her seams, it was recommended that "the metal on her bottom be stripped off, that she be recaulked throughout, refastened where deemed necessary, resheathed with yellow metal, and that all other necessary repairs be made, to put her again in a good seaworthy condition."

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It appears from the evidence of the master that an estimate was made at that time as to the expenses of the repairs; it was not in writing, but the gross sum was put somewhere between 800*l.* and 900*l.* This was about the 28th of April. The captain endeavoured to obtain money on the credit of the owner; and failing to do so had recourse to a bottomry bond, which is dated the 19th of May, and by which he obtained, according to the terms of the instrument, “\$8341. 53 cents., which reduced to pounds sterling at \$5 to the pound, is 1668*l.* 6*s.* 1*d.*” This sum was to pay repairs and wages, disbursements of the ship, and expenses of the hospital, and the wages of the crew home. The vessel sailed on the 21st of May, and arrived in Liverpool on the 2nd of July. There the cargo was sold.

A portion of this freight, 256*l.* 19*s.* 2*d.*, had been advanced at Minatitlan. The ship was sold by the marshal of the court, and fetched 800*l.* And the upshot appears to be that the proceeds from the ship and freight, after all expenses are deducted, are insufficient by 663*l.* 14*s.* 2*d.*, to satisfy the bond; the proceeds of the cargo were somewhere about 566*l.* 18*s.* 3*d.*, and there would remain about 100*l.* unpaid of the bond, after it had swallowed up ship, freight, and cargo. The fact, however, that the cargo eventually derives no benefit from the bottomry bond, does not per se, as was properly admitted, invalidate that instrument: *Benson v. Chapman*. (1) The true question is whether, having regard to all the circumstances, it is such an agreement as an honest and prudent master would, for the benefit of all parties, the owners of the ship, as well as of the cargo, at the time have entered into. It is important to observe that both according to the pleadings as amended and the argument for the defendant, no question arises as to the perfect honesty of the transaction. I am clear, also, upon another point in this case; there was neither a duty, nor indeed as far as the evidence goes a power on the part of the master, to tranship the cargo. I am relieved therefore, from the consideration of that important, and I believe undecided, point, whether according to the law of this country transhipment is ever obligatory upon the master.

The cargo in this case was not of a perishable nature, and in the



case of the *Hamburg* (1), where the articles were said to be "not of a rapidly perishable nature," the Lords of the Privy Council said, "The master was certainly not bound to tranship his cargo; indeed his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty."

In the present case, the repairs being necessary to enable the ship to carry the cargo to its destination, the master not being able to raise the money on the personal credit of his owners, the bond being entered into *bonâ fide*, and transhipment not being obligatory, the inquiry as to the validity of the bond is narrowed to the single question, whether in the circumstances the master ought to have communicated with the shipper, Mr. Price, or with his agent, Mr. Graham, of Liverpool. It appears that the master knew that Messrs. Graham and Co. were consignees named in the bill of lading, and that he delivered the letter to them sealed up when he arrived at Liverpool: he says he did not write to them, because he thought his owner in Cardiff would write to them, and also that he thought he would not get an answer back again before he left Key West. It appears that he wrote to his owner from Minatitlan, and also ten days after his arrival in Key West, by the first mail that went out after the ship came there. His owner wrote him an answer, but he never received it. With respect to Mr. Price, the master's reasons for not communicating with him appear to have been first, the great uncertainty of communication at all times between Key West and Minatitlan, on account of the circuitous route by which letters travel from Key West to Minatitlan, namely, from Key West to Havannah, from Havannah to New York, and thence to Minatitlan; there being no regular boat for the conveyance of letters, but a cargo boat, as I understand the evidence of the master, used to call at Key West from New Orleans on her way to New York. There is however no doubt from the evidence of the American postmaster, that the communications between Key West and New York are at all times irregular and uncertain. This ordinary difficulty of communication between Key West and Minatitlan must have been considerably enhanced by the civil war which was then raging in the Mexican territory. Looking to all the circumstances, the

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(1) Brow. & Lush. 253, 272.

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master's evidence that he might write to Minatitlan and get an answer back in three or four weeks, appears really to be founded on conjecture. It was truly observed that no instance of any letter having been sent from Key West to Minatitlan, to which an answer was received during the Mexican civil war, has been produced before the Court.

It is said that the *Lizzie* lay for three months at Key West, and that interval did elapse between the date of her arrival and of her departure; but it was not till the 26th of April that it was discovered that such extensive and expensive repairs were necessary as entailed the necessity of having recourse to a bottomry bond; and the repairs had been effected, and the vessel was on her way to England, within less than a month from that time. I do not think that the master is to blame for the delay which prevented his putting his ship upon the slip, or for not anticipating that the "worm-eaten ship" would occupy the slip for five weeks. It is true that he had already borrowed 500*l.* upon personal credit; but that was for the purpose of defraying expenses already incurred, connected with the sickness and discharge of his crew, and had nothing to do with the repairs of the ship.

I see no reason to doubt that the master is speaking the truth, when he says that he conceived the vessel to be worth at least 1200*l.* at the time when the repairs were done to her. Speaking of her sale in this country, he says, "she was given away;" and it does often happen, I believe, that vessels of which the sale is compulsory do not fetch the price which they would have commanded if the sale had been delayed.

Now the principles of law which I must apply to this case are those laid down by the Lords of the Privy Council in *The Buona-parte* (1), and *The Hamburg*. (2) There is no doubt that according to the authority of these cases, as well as that of the *Gratitudine*, which they followed, "the character of agent for the owners of the cargo is imposed upon the master by the necessity of the case and by that alone." And by the two former cases it has been established as a necessary consequence of that proposition that the master, before he hypothecates the cargo, ought, if he have according to reasonable intendment the means of doing so, to communicate with

(1) 8 Moo. P. C. 459.

(2) Brow. &amp; Lush. 253.

the owner. For what purpose? It has been said by the counsel for the bondholder, merely to give the owner an opportunity of advancing the requisite funds; but I cannot think that this is the only ground which necessitates the communication. Another ground would surely be, to give him an opportunity of unlading the cargo altogether. I think, indeed, that he could not do this without payment of the entire freight. I am not aware of any English decision directly upon this point, but the language of jurisprudence appears to be in accordance with the Rhodian law, "Si vero mercator eximere merces voluerit naulum integrum exercitori solvat." "Dès qu'une fois," Boulay-Paty observes, "l'affrèteur a commencé à charger ses marchandises dans le navire, il ne peut plus les retirer qu'en payant la totalité du fret convenu, si le navire part à *non charge*." (1) If there be an opportunity for the owners to express their will as to either of these two grounds with respect to their cargo, the master, who is the agent of necessity and not of their choice, has no right to deprive them of this opportunity, and therefore must communicate with them if it be reasonably within his power to do so. In the case of the *Hamburg* their Lordships said (2), "Where the cargo belongs to a single individual, known to the master, the ship in a port in the same country, or near to it, in which that owner is resident, the means of communication sure and speedy, the probable delay inconsiderable, the cargo not of a perishable kind, the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is that, where all these circumstances were reversed, no such duty would be incumbent on him. . . . What is in effect the practical conclusion, but that the question, whether a master must communicate or not, is one which can only be decided by the circumstances in each particular case?"

Upon the whole, I am of opinion that the circumstances of this particular case do not bring it within the principles which render a communication from the master to the owners a necessary precedent condition to the validity of a bottomry bond which hypothe-

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(1) Cours de Droit Commerciale Maritime, vol. ii., p. 380. (Ed. 1834.)

(2) Brow. & Lush. at p. 274.

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cates the cargo. Fraud there was none, nor does it appear to me, having regard to all the circumstances of the case, and especially to the nature of the port and the character of the cargo, that the master at the time did act improvidently, however unfortunate the issue may have been, on behalf of the owners of the cargo. I bear in mind the often-repeated opinion of Lord Stowell as to the justice and expedience of upholding bonds of this description; and I remember that, while by a decision in favour of the validity of this bond the interests of the bonâ fide lender will be protected, the owner of the cargo has, under the authority of *Duncan v. Benson* (1), his remedy over against the owner of the ship.

I pronounce in favour of the bondholder, and I must condemn the defendants in the costs of their opposition.

Proctors for plaintiffs: *Toller & Sons.*

Proctors for defendants: *Pritchard & Sons.*

April 24.

THE DARING.

*Bottomry Bond by Master and Part Owner on Ship, Freight, and Cargo—Suit by Master for Wages—Priority—17 & 18 Vict. c. 104, s. 191.*

Where a master being also part owner of a vessel, had bound himself by a bottomry bond on ship, freight, and cargo:—

*Held*, that the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder.

In such a suit by the master, the Court will not under s. 191 of the Merchant Shipping Act, 1854, entertain a counter claim by the owner of the cargo.

THIS was a suit brought by George Augustus Crisp, late master and part owner of the *Daring*, to recover his wages and disbursements, under the following circumstances:—

On the 10th of May the *Daring* sailed from Valparaiso on a voyage to Talcahuana, to complete her cargo, and thence to the United Kingdom. She met with various misfortunes. Her master, who was also part owner, was obliged to sell a portion of her cargo, and to effect certain repairs in Coronel Bay. She continued her voyage, but she sustained further sea damage which rendered her further voyage impossible, and she put into Talcahuana on the

(1) 1 Ex. 537; in Ex. Ch. 3 Ex. 644.



2nd of September, 1866. Part of her cargo was there unshipped, but as the repairs were too extensive to be done at that place, she was taken to Valparaiso on the 17th of February, 1867; when the master having neither funds nor credit, gave a bottomry bond (by which he bound himself personally) on the ship, freight, and cargo, for the sum of 7807*l.* 1*s.* 2*d.* 1868  
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The *Daring* arrived at London, her port of destination, in July, 1867. On the 14th of December, 1867, the plaintiff entered a suit against the vessel and freight for wages and disbursements, in the sum of 866*l.* 1*s.* 2*d.*, and entered a caveat against the release of the vessel and freight. On the 13th of January an appearance was entered on behalf of Messrs. Gibbs and Sons, and Messrs. Graham & Co., consignees of part of the cargo, who opposed the suit of the master; and alleged, that the *Daring* and her freight were insufficient to satisfy the bond, and that any sum which the consignees of the cargo might be compelled to pay in respect of the bond would be a debt due to them, and recoverable by them by law from the plaintiff; that the master, being part owner, was not entitled to sue the ship or freight without submitting to an account between himself and his co-owners, and they set up a counter claim under s. 191 of the Merchant Shipping Act, 1854; that the claim of the master should not be pronounced for, in prejudice of the interests of the consignees of the cargo; and prayed the Court to stay all proceedings in the suit until the bottomry suit was determined.

*Clarkson*, for the plaintiff.

*Lushington*, for the defendants.

The following cases were referred to: *The Mary Ann* (1); *The Edward Oliver* (2); *The Cargo ex Galam* (3); *The Glentanner* (4); *Duncan v. Benson*. (5)

SIR ROBERT PHILLIMORE. There are several propositions of law and practice which I must consider as binding upon me in adjudicating this case.

First: That the master has a maritime lien in rem, that is, on

(1) Law Rep. 1 A. & E. 8. *21* (4) Swab. 415.

(2) Law Rep. 1 A. & E. 379. (5) 1 Ex. 537; in Ex. Ch. 3 Ex. 644.

(3) Brow. & Lush. 167.

1868 ship and freight, for his wages and disbursements: *The Mary*

THE DARING. *Ann.* (1)

Secondly: That this lien is liable to be postponed to that of the bottomry bondholder in cases where the master has by the terms of the bottomry bond bound himself as well as ship and freight for the payment of the bond; but that this rule does not extend to cases in which the bondholder would not be prejudiced by the master being paid before him. On this principle, in *The Edward Oliver* (2), where the master gave a bond which bound himself, ship, freight, and cargo, and where the ship and freight proved insufficient to satisfy the claims of the master and the bondholder, the proceeds of the ship and freight were ordered to be first applied in payment of the master's claim, the bondholder having a security by reason of the liability of the cargo, for the full payment of his bond, and the Court holding that the owner of the cargo could not invoke a rule made for the protection of the bondholder. Practically, in that case, the cargo contributed, though indirectly, to pay the wages of the master.

Thirdly: In *The Feronia* (3) I ruled that the fact of a master being also part owner did not deprive him of his maritime lien for wages and disbursements.

The contention of the defendants is not that they have any specific lien against this ship and freight, nor of course, therefore, against the proceeds in court which represent that ship and freight. They do not desire to institute an action against the plaintiff in his capacity of master. They maintain that they expect to succeed in an action for general average brought in another court, against the defendant personally, and that having so succeeded they will make an application to this Court to apply in some way these proceeds in satisfaction of their claim, the amount of which it is to be observed is at present unascertained. The action in this court at present is not against the defendants, but against the vessel, and it is brought by the master under the provisions of a statute. What authority has this Court to refuse to entertain his action? But it is prayed that proceedings may be stayed until the proceedings in the bottomry suit be determined; and if I could see my way to

(1) Law Rep. 1 A. & E. 8.

(2) Law Rep. 1 A. & E. 379.

(3) Ante, p. 65.

doing complete justice in the whole matter arising out of the several claims of the master, the bottomry bondholder, and the owners of the ship and the cargo, I should be disposed to grant this prayer. But I am afraid that I have no such power. Suppose that proceedings were stayed, and eventually the bottomry bond was ordered to be paid out of the cargo; such a result would give the owners no claim upon the funds now in Court unless I have power to entertain a suit for general average. *The Cargo ex Galam* (1) is cited as proving that I may entertain such a suit; but in that case the question of general average was forced upon the Court by the peculiar circumstances, for the master had a common law lien on the cargo which was in his possession, and which the order of the Court had compelled him to bring into Court.

In that case the Privy Council, reversing the decision of this Court, said (2):—"To enforce and give effect to a lien at the instance of a party seeking to establish it, is quite a different thing from setting it aside and annulling it when it arises in the Court incidentally in the progress of a cause over which the Court has properly jurisdiction. The captain here does not say: I have, by the maritime law, a lien which the Court of Admiralty will enforce as it does in cases of bottomry, and other cases not depending upon possession; but he says: I am in possession of this cargo, and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied. If he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other Court in the kingdom could do—destroy a right which exists by law? The case would be quite different if the captain, having parted with the cargo, had sought to enforce a lien in the Court of Admiralty. The lien would be gone (unless there were some special contract) with the loss of possession, and the Court of Admiralty would properly say: We have no jurisdiction in this matter; we have no means of enforcing contracts or compelling contributions; we decline to interfere."

Their Lordships then go on to refer to the two cases of *The Constanca* (3) and *The North Star* (4); but they say (5):—

(1) *Brow. & Lush.* 167.

(3) 2 *Wm. Rob.* 487.

(2) *Brow. & Lush.* at p. 182.

(4) *Lush.* 45.

(5) *Brow. & Lush.* at p. 184.

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"Neither in these cases nor in any other can we find any decision or dictum that when a clear legal right of lien is proved in the Court of Admiralty to exist, that Court can dispose of the property without regarding it, and thus in effect decide against it . . .

"Upon the whole, their Lordships are of opinion that the claim for freight and general average is the first demand upon the funds in court." They said, however, that "the respondents must be at liberty to have the claim for general average strictly investigated." (1)

Moreover, in the case of *The Cargo ex Galam*, the Court had all the owners of cargo before it : in this case I have only some of the owners before me. It has not been suggested that I have power to compel the absent owners to appear, or to enforce the proper contributions. The case of *The Union* (2) certainly establishes that when the owner of the cargo has an interest in the administration of the fund in court, he is entitled to appear and contest the mariner's claim for wages ; but the same case decided that "the claim of the seamen was superior to the claim of the bondholder, and therefore to the claim of the owner of the cargo, who derives through the bond ;" and when the circumstances of that case are considered, it will appear that they were especially favourable to the equitable claims of the owner of the cargo. Having arrived at the conclusion that I have no authority in this case to entertain a suit for general average, I have not thought it necessary to notice *Hallett v. Wigram* (3), and other cases cited to me on this subject. It remains to consider whether s. 191 of the Merchant Shipping Act gives any *persona standi* in this suit of the master for wages to the owner of the cargo. I am of opinion that this section relates to claims between the master and the owners of the ship, or persons claiming under them, as in the case of *The Glentanner* (4) : it does not contemplate the adjustment of counter-claims against the master as part-owner of the ship ; and this section is therefore, I think, inapplicable to this case.

The conclusion to which the premises I have stated lead me is, that I must comply with the prayer of the proctors for the plaintiff,

(1) Brow. & Lush. 185.

(2) Lush. 128.

(3) 9 C. B. 580.

(4) Swab. 415.



and pronounce for the claim of the plaintiff, and decree a reference to the registrar, with costs out of the proceeds in court.

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Proctors for plaintiff: *Clarkson, Son, & Cooper.*

Proctor for defendants: *Waddilove.*

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April 28.

*Collision—Pleading.*

Pleadings should be so framed as to assist not only the party in his statement of the case, but also the Court in investigating the truth between the litigants; the defendant in a collision cause cannot rely on a simple negative, but must state the circumstances relating to the collision.

THIS case came before the Court on motion to amend the answer to a petition in a cause of collision, on the grounds (1) that the pleading was unusual; (2) that it was too vague.

The 3rd article of the petition alleged that “the *Margaret* was close hauled on the starboard tack, and so continued for some time prior to and until the collision hereinafter mentioned; the *Why Not* was on the port tack, and approaching under such circumstances as rendered it the duty of the *Why Not* to avoid the *Margaret*; but the *Why Not* nevertheless came into collision with her, the stem and port bow of the *Why Not* striking the port bow of the *Margaret* by the fore rigging. In consequence of the collision the *Margaret* almost immediately afterwards sank, and three of her crew, who were the only persons on deck until shortly before the collision, were drowned.”

The answer pleaded:—“3. On the 5th of January, 1868, about 7 P.M., the *Why Not*, then on a voyage from Llanelly with coals for Cherbourg, was in the English Channel about fifteen miles off the Start; the night was rather dark and cloudy, the wind about N.E. The *Why Not* was close hauled on the port tack. She was carrying the regulation lights, duly exhibited and brightly burning, and a good look-out was being maintained on board her. 4. In these circumstances the red light of a vessel, which proved to be the *Margaret*, also on the port tack, was observed about W. by N., distant about a mile. 5. The *Margaret*, which was sail-

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ing more rapidly than the *Why Not*, afterwards came under the lee of the *Why Not*, then crossed her bow, and then ran down under the *Why Not's* lee, and hauled up and spoke the *Why Not*. Shortly afterwards the *Margaret* improperly came round in stays, rendering a collision imminent. The *Why Not* immediately put her helm down, but failed to stay, and the collision then ensued, the jib-booms of the two vessels being the parts first in contact."

April 21. *Pritchard*, in support of the motion. The 5th article is too vague; the defendants do not state their case; they ought to tell what they did in the collision.

*Lushington*, contra, referred to *The East Lothian* (1), where it was held that the defendants might have contented themselves with a denial of the averment in the petition.

*Cur. adv. vult.*

April 28. SIR R. PHILLIMORE [after stating the pleadings]:—It is contended on the part of the plaintiffs that the defendants were bound to state their version of what occurred after the *Margaret* had been so observed at the distance of a mile, and how the vessels came into collision, as he must already have done according to the rules of the Court in his Preliminary Act, which is however not seen by the plaintiff until the hearing of the cause. On behalf of the defendant it was argued that he is entitled to stand entirely on the defensive, and not to plead any circumstances at all, but to rely on a simple negative; and *The East Lothian* (2), has been cited as an authority for this proposition. There can be no doubt that such a course is at variance with the usual practice of this Court, both before and after that decision. The rules of pleading ought to be adapted to the nature of the case which it is their object to bring before the Court. They are not to be considered as constituting a game of skill between the advocates. They ought to be so framed as not only to assist the party in the statement of his case, but the Court in its investigation of the truth between the litigants. The rules of evidence ought to subserve the same end.

The cases of collision tried in this Court are of a peculiar

(1) *Lush.* at p. 248.

(2) *Lush.* 241.

character, and such as require the application of particular rules of pleading in order to secure the due administration of justice. Much experience has proved that justice was often defeated by a case set up in Court to meet the case developed by the evidence on the other side, but which the Court, assisted by assessors of nautical experience, well knew could not have been the true statement of the actual circumstances of the collision. To remove this obstacle to the administration of justice, rules were framed by the Court requiring each party in a cause of collision to file before any pleadings had taken place what is called a Preliminary Act. These documents are sealed up, and not opened till the hearing. They contain the answers of each party to several questions carefully framed to elicit the facts as to the leading points in every case of collision. The result has fully proved the fitness of this order to elicit the truth; it is, however, a mode of procedure adopted in this Court alone, and suited to the peculiar constitution of this tribunal. Much of the advantage of the Preliminary Act is derived from the opportunity which it affords of contrasting the statements as to the causes of the collision set up by the parties before they know the case which either intends to rely upon in their pleadings, and it is obvious that this advantage would be impaired if the defendant might content himself in his answer with relying on a simple negative. A question of this kind was brought before my predecessor in the case of the *Claus Thomesen*. In that case an objection was made to an answer, and Dr. Lushington said: "Without considering the principles of pleading by which this Court is governed, it is sufficient in this case to notice one objection to the answer. Every pleading, whether the petition or the answer, ought to be so framed as that if the evidence was taken before an examiner, the pleadings alone would enable him to elicit all the facts of the case."

This seems to be a decision very much in point in the present case. The *East Lothian* established this principle, that the plaintiff must recover upon the strength of his own case, and not upon the weakness of the defence; and therefore where the plaintiff had clearly failed in proving that the collision had happened in the manner alleged in the petition, the defendant was entitled to be dismissed with costs, although he had ascribed the collision in his

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answers to causes disproved by the evidence. To this decision, and the principle upon which it was founded, I readily subscribe. It does not seem to me, when considered generally, and with reference to all the circumstances and pleadings in the case to which it was applied, to furnish an authority for the novel experiment in pleading attempted in the answer before me.

I direct a fuller statement to be made as to what the *Why Not* did between the time of sighting the *Margaret* and the collision. This reform may be effected by enlarging the 4th article, or adding a new article.

Proctors for plaintiffs: *Pritchard & Sons*.

Proctor for defendants: *Tebbs*.

May 27.

## THE EXCELSIOR.

*Damage done by a Ship to a Breakwater—Respective Duties of Master and Dockmaster.*

By the regulations relating to Falmouth harbour, "masters and persons in charge of vessels are to cast off and remove them whenever required, and in the event of neglect or refusal to do so, they will be removed by the dockmaster. Vessels are to strike their yards and masts, if required." The master of a vessel which had been moored at the eastern pier was desired by the dockmaster to remove her to the western pier, and to strike his topgallant masts, &c. On the master's refusal to obey the order (he having left the vessel with only three persons on board), the dockmaster removed her to the western pier, where during a gale she broke from her moorings and did considerable damage to the wharf:—

*Held*, that by the regulations the dockmaster had a discretion to exercise for the welfare of all ships entering the harbour; and that the master was bound to obey the order and assist in the removal of his ship, even though, if the interests of the ship alone were to be considered, such removal was injudicious.

That it was the duty of the master to have kept a sufficient crew on board to protect his ship against ordinary perils.

*Held*, further, that, as a matter of fact, the damage was caused by the negligence of the master, and his refusal to obey the orders of the dockmaster; and, consequently, that the vessel was liable for such damage.

ACTION brought by the plaintiffs, the Falmouth Dock Company, for damage done to the western wharf or breakwater of the Falmouth Harbour on the 5th and 20th of January, 1867, by the ship *Excelsior*.

3 Q. 2. 581  
2 PD. 54.



The *Excelsior* was a ship of 1131 tons register. On the 24th of November, 1866, she was towed into the inner Falmouth Harbour, alongside the eastern pier, and was properly moored. Among the regulations relating to this harbour was the following :—"Masters and persons in charge of vessels are to cast off or remove them whenever required ; and in the event of neglect or refusal so to do, they will be removed by the dockmaster at the owner's expense. Vessels are to strike their yards and masts, if required." The ship lay at the eastern wharf until the 22nd of December. During all this time the ship's topgallant yards and topgallant masts were standing, although the dockmaster several times desired the captain to strike them.

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On the 22nd of December, the dockmaster ordered the captain to remove his vessel to the western pier, as he desired to put an injured vessel in the place where the *Excelsior* was lying. The captain refused to obey the order, and left the ship. She was then removed by the dockmaster, and moored against the western wharf.

On the 5th of January, during a heavy easterly gale, the ship parted from her hawser, struck the wharf with great violence, and did considerable damage to it.

After the gale the vessel lay as before till the 20th of January, when another gale came on ; again the rope parted, and again the ship was dashed against the pier.

The plaintiffs are governed by a local act, called the Falmouth Docks Act, 1864, with which is incorporated the Harbours, Docks, and Piers Clauses Act, 1847, one of the provisions of which is as follows :—"Every vessel in the harbour or dock, or at or near the pier, shall have substantial hawsers, towlines, and fasts fixed to the dolphins, booms, buoys, or mooring-posts, when required by the harbourmaster ; and if any vessel shall be in the harbour or dock, or at or near the pier, without substantial hawsers, towlines, or fasts fixed as aforesaid, after notice from the harbourmaster to the master of such vessel to furnish or fix the same, such master shall, for every such offence, be liable to a penalty not exceeding 10*l*."

The defendants alleged that the damage was caused by the plaintiffs improperly placing and keeping the *Excelsior* at the western wharf.

The cause was heard before the Court and Trinity Masters.

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May 7. *Sir W. B. Brett, Q.C. (S. G.), and Lushington*, for the plaintiffs.

*Aspinall, Q.C., and Clarkson*, for the defendants.

*Cur. adv. vult.*

May 27. SIR R. PHILLIMORE. The questions for the Court to decide are, whether the damage (which is clearly proved) was caused by the negligence or default of the master or his servants, or by the misconduct of the dockmaster in causing the vessel to be improperly moored; or whether the damage was caused partly by the misconduct of the master of the vessel, and partly by that of the dockmaster. [After stating the facts as above]:—These are the principal facts of the case. The law applicable to them must be determined by a consideration of the respective duties of the master of the ship and the dockmaster. It has been contended, on behalf of the former, that he had a right to remain in the place in which he was first moored, and that the dockmaster had no right to remove him. I am of a different opinion. I think that the statutes and the regulations, as well as the necessity of the case, clothe the dockmaster with a discretion upon this subject, to be exercised for the welfare of all the ships which enter the harbour, and that the master was bound to obey this order and to assist in the removal of his ship; he might do so, indeed, under protest, and reserve to himself the right of holding the company liable for every damage done to his ship, in consequence of obedience to the order, but he had a duty to perform towards his ship in this instance, the neglect of which was highly culpable.

The Trinity Masters think the ship was better protected against the easterly gale and sea raised by such a gale where she was originally moored by the eastern pier, and that, if the interests of the ship alone were to be considered, it was injudicious to move the ship; but, on the other hand, it is to be remembered that it was the duty of the dockmaster to consider the interests of all the shipping in the harbour, and that if the injured and dismasted ship which took the place of the *Excelsior* absolutely required a protection which the *Excelsior*, with proper care, did not require, it was not an improper exercise of discretion to order the removal of that vessel. The further question then arises—with

proper care would the *Excelsior* have been safe in her moorings? It appears to me that the damage done, both to the pier and to the ship, is fairly attributable to two causes: 1st, and principally, to the insufficiency of the crew left on board for the management of the ship at that place in that weather.

The Trinity Masters are most clearly of opinion that the crew was insufficient for the due management and care of the ship. It has been contended that it was the duty of the dock company to provide a sufficient number of hands for the ship.

The proposition, however, was not put so high as this—that the captain had a right to abandon the ship altogether, and devolve the whole care of it upon the company; but it was said that the few hands he left on board were so adequate for all purposes for which he was bound to provide, that he was entitled to rely on the company for special emergencies, such as happened on this occasion.

The duty of a dock company generally was much discussed in the case of *Thompson v. North-Eastern Railway Company* (1), which was argued before the Queen's Bench and the Exchequer Chamber in 1862. In that case the former decisions on the subject were reviewed, and the judgment of Tindal, C.J., in the *Lancaster Canal Company v. Parnaby* (2), was relied upon. In these cases the law is laid down to this extent only, viz., that it is the duty of a dock company to take reasonable care that the dock is kept so free from obstruction that those who use it may do so without danger to their property.

The respective duties of a dock company and the master of a ship must depend in some measure upon the actual condition and place of the dock, as well as upon the statutes which regulate their authority. For instance, it may possibly be that in the West or East India Docks in the river Thames, or in some of the Liverpool docks, or in some dock from its situation and construction perfectly secure in all weather, that a single watchman may suffice for the protection of the ship, so far as the duty of the captain is concerned, and that he may be justified in relying for any further protection upon the dock company; in other words, that they may have expressly or tacitly bound themselves to require no further assistance from the captain. In this case the dock is certainly

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(1) 2 B. & S. 106, 119.  
*per 2591.*

(2) In error, 11 Ad. & Ell. 223, 241.  
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unfinished, and, in fact, is a harbour rather than a dock in its present state. But if the western side of it was a more exposed position than the eastern for the *Excelsior*, it was not a secret danger of which the dockmaster was cognizant and the captain ignorant, and surely this fact did not give the captain a dispensation from the care and diligence which the duty of his office ordinarily imposes upon him. I do not say that it was incumbent upon him to have kept a full sea crew on board; but I do say that he ought to have kept a sufficient crew on board to have protected his ship against the ordinary incidents of peril which a competent seaman would foresee and provide against, in which category I place the gales of the 5th and 20th of January in the harbour of Falmouth. The master did not sleep in his ship, neither did his chief nor second mate; but the master must or ought to have known that bad weather was coming on on the 5th; he does not come down to his ship till late in the day, and until, in fact, his duty has been performed by a stranger. For the accidents of the second gale after the warning of the first he is even more to blame.

I am of opinion that he was guilty of an indefensible dereliction of his plain duty in neglecting the proper precautions for the safety and care of his ship. The second cause of this damage is the refusal of the captain to lower his topgallant yards and masts. I am of opinion that this refusal is clearly proved, and the Trinity Masters instruct me that it would have been the duty of a prudent captain to have taken this measure of his own accord. Upon the whole, therefore, I am led to the conclusion that the fair result from the positive evidence produced before me on behalf of the plaintiffs, and from the absence of contradictory testimony from those on board the *Excelsior*—which would, of course, have been given if it could have been given with advantage by the defendants—is that if the master of the *Excelsior* had done his duty to the ship, and had obeyed the lawful orders of the dockmaster, this accident, and the injury occasioned by it, would not have happened.

I must, therefore, pronounce the *Excelsior* to blame.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*

Proctor for defendants: *Ayrton.*



## THE FELIX.

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June 9.

*Bill of Lading—Non-delivery of Cargo—Right to Sue—Usual Place of Discharge—Custom of Port.*

The plaintiffs were indorsees of the bill of lading of a cargo which, according to the charterparty which contained a reference to the bill of lading, was to be unloaded at S. "at the usual place of discharge, and according to the custom of the port." The plaintiffs had agreed to sell the cargo to B. & Co., but the purchase-money had not been paid, nor had the bill of lading been indorsed to B. & Co. On the arrival of the vessel at S., the master put into the South Dock, when the plaintiffs ordered him to remove her to the Gill Dock, which the master refused to do until he had been paid the expenses incurred by entering the South Dock. Both docks were usual places of delivery for similar cargoes. In a suit for breach of contract for non-delivery of the cargo:—

*Held*, first, that the plaintiffs were entitled to sue in this court under the Admiralty Court Act (24 Vict. c. 10), s. 6, when construed with the Bills of Lading Act (18 & 19 Vict. c. 111).

Secondly, that, in default of a custom to the contrary being proved, the master was not bound to lie in the river waiting for instructions, and was justified in mooring in the South Dock, but that having received directions to deliver his cargo in the Gill Dock, he was bound to obey them.

THIS cause was instituted by Messrs. Peacock, merchants, of Sunderland, against the ship *Felix*, and her owners, for damages for the non-delivery of the cargo of the ship by her master according to their order, into the Gill Dock in the port of Sunderland.

The plaintiffs were the indorsees for value of the bill of lading of the cargo, which consisted of fir timber, used for "props" in the coal mines of Durham, and was shipped on board the *Felix*, at the port of Gothenburg, by a person of the name of Wlengel, who indorsed the bill of lading to the plaintiffs.

On the 12th of October, Messrs. Peacock entered into an agreement for the sale of the cargo thus indorsed to them, with Messrs. Bell & Co.

The *Felix* arrived at the port of Sunderland on the 13th of October. The purchase-money for the cargo had not been paid, either wholly or in part, before the arrival of the *Felix*, nor had the plaintiffs indorsed or delivered the bill of lading to Messrs. Bell & Co.

The plaintiffs in their petition alleged that, by the usage and custom of the port of Sunderland, the master of the ship was under

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the bill of lading bound to deliver the cargo to the plaintiffs at such place within the port, being a usual place for delivery by ships like the *Felix* of cargoes like the cargo as the plaintiffs should direct; that the ship arrived at the port of Sunderland on the 13th day of October, 1867, with the cargo on board her, and the plaintiffs duly ordered her master to take the ship into the Gill Dock, and there deliver the cargo to the plaintiffs, but although the Gill Dock was a usual place for delivery by such like ships of such like cargoes as aforesaid, and although the plaintiffs became entitled to have the cargo delivered to them in that dock, the master, in breach of his duty to the plaintiffs, refused and neglected to take the ship into the dock, and to deliver the cargo to the plaintiffs in the dock; that the master subsequently, in breach of his duty and of his contract, wrongfully discharged the cargo in a dock other than the Gill Dock, and wrongfully delivered the cargo to the commissioners of the river Wear, and wrongfully caused the same to be detained by the commissioners from the plaintiffs for alleged demurrage and other claims of the master, not lawfully chargeable against the plaintiffs.

The following were the material portions of the bill of lading and of the charterparty:—

“Bill of lading.—Shipped in good order and well conditioned by C. Wlengel in and upon the good ship called the *Felix*, whereof is master for this present voyage S. H. Buschen, now lying in the port of Gothenburg, and bound for Sunderland—6719 pieces of pit-wood . . . to be delivered in the like good order, and well conditioned, at the aforesaid port of Sunderland, unto order or to assigns, he or they paying freight for the said goods and other conditions as per charterparty of 13th September, 1867.”

“Charterparty.—Captain S. H. Buschen charters to Mr. C. Wlengel his said ship, being perfectly tight, staunch, and strong, properly manned, victualled, and equipped, provided with regular ship's documents, and every way fitted for making a voyage from Gothenburg to Sunderland, where after having duly delivered the cargo, this affreightment ceases, and the voyage is ended. The cargo is to consist of pit props, with necessary short lengths, a full and complete cargo in the hold and upon deck.

“The loading is to take place in this river, as near to Mr. C.

Wlengel's wood yard as the vessel can safely float, and as fast as the captain requires the cargo. And the unloading at Sunderland at the usual place of discharge, and according to the custom of the port for ships with similar cargoes, and of the same draught of water, in five working days, to be reckoned from the day after the ship has taken her berth and is ready to discharge; for every day that the vessel may be longer detained the captain is entitled to 3*l.* sterling, to be paid him by the receiver of the cargo daily as it falls due, but no demurrage is to be charged whilst the loading or discharge is prevented by natural impediments or holidays."

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The defendants in their answer, denied the usage and custom of the port alleged in the petition, and that the plaintiffs duly ordered the master to take the ship into the Gill Dock and there deliver the cargo to the plaintiffs; and alleged that before any orders as to the place of discharge were received by the master the vessel had entered and was moored in the South Dock, which is the usual place of discharge for ships with similar cargoes, and of the same draught of water as the *Felix*; that the Gill Dock is not a usual place for delivery by such like ships and of such like cargoes, as in the petition is alleged; that there is not sufficient water in the said Gill Dock at all times of the tide for the *Felix* to lie afloat there, and the vessel could not have delivered her cargo there without taking the ground; that the Gill Dock is a private dock, belonging to the Earl of Durham, and is used exclusively for the loading and unloading of cargoes belonging to him; and also denied that the plaintiffs became entitled to have the cargo delivered to them in the Gill Dock, and that the master in breach of his duty to the plaintiffs refused and neglected to take the ship into the dock, and to deliver the cargo to the plaintiffs in the said dock.

At the hearing of the cause, evidence was given that the plaintiffs' water clerk went to the pier at Sunderland, and found the *Felix* being moored in the South Dock, when he explained to the master that he came from the consignees of the cargo, and told him to go to the Gill Dock. Something was said about the expenses of mooring in the South Dock, but no definite offer was made to pay them, and eventually the master refused to discharge his cargo in the Gill Dock.

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May 12. *Aspinall, Q.C.*, and *Clarkson*, for the plaintiffs. The plaintiffs were no parties to the charterparty, and it cannot affect them unless it were incorporated in the bill of lading, which it is not: *Russell v. Niemann*. (1) On the bill of lading, the plaintiffs were entitled to have the goods delivered according to the custom of the port. The master was bound to obey the directions of the owners provided they were given at a reasonable time: *Taylor v. Great Northern Railway Company*. (2) The custom at Sunderland is, that a vessel with no specific orders, should drop anchor and wait a reasonable time, and on receiving orders should proceed to the place mentioned, assuming it to be a usual place of discharge which the Gill Dock is. Supposing that the master was entitled to go into the South Dock, he should have obeyed the orders given him, and have gone into the Gill Dock.

*Manisty, Q.C.*, and *Butt*, for the defendants. The contract is to be collected from the bill of lading and the charterparty taken together. The plaintiffs were bound by the time and place fixed by the charterparty to entitle them to demurrage; the lay days do not begin to run till the ship takes up her berth at the usual place of discharge: *Brereton v. Chapman*. (3) The words "at the usual place of discharge," are distinct from the words "according to the custom of the port." A ship cannot remain in the river as long as the consignees please, and apart from what may be reasonable, or what is the custom. The reference in the contract is not to "a usual place," but to "the usual place." The first term would include the Gill Dock, but the usual place was, no doubt, the South Dock. What is the usual place of discharge, is a question of fact: *Kell v. Anderson*. (4) A custom cannot be engrafted upon a charterparty: *Kirchner v. Venus*. (5)

As to the plaintiffs' right to sue; by the contract with Messrs. Bell & Co., the property has passed out of the hands of the plaintiffs, but it has not vested in Messrs. Bell & Co., for the bill of lading was never indorsed or delivered to them. Wlengel, the original shipper, alone has a persona standi as a suitor in this cause. Before the Bills of Lading Act, neither Messrs. Bell & Co. nor

(1) 17 C. B. (N.S.) 163.

(3) 7 Bing. 559.

(2) Law Rep. 1 C. P. 385.

(4) 10 M. &amp; W. 498.

(5) 12 Moo. P. C. 361.



Messrs. Peacock & Co. could sue in this Court; it is not the indorsement of the bill of lading, but the vesting of the property which gives the right to sue: *Smurthwaite v. Wilkins* (1); *The St. Cloud* (2); *The Norway*. (3)

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*Aspinall*, Q.C., in reply, referred to *The Figlia Maggiore*. (4)

*Cur. adv. vult.*

June 9, 1868. SIR ROBERT PHILLIMORE. The first question in point of order raised in this case is whether, in these circumstances, the plaintiffs are entitled to sue. On behalf of the defendants, it has been contended that, by the contract with Messrs. Bell & Co., the property has passed out of the hands of Messrs. Peacock, and yet, inasmuch as the bill of lading has never been indorsed nor delivered to Messrs. Bell, the property is not vested in them; but, as I understood the argument, that the original shipper alone, Wlengel, has a persona standi as a suitor in this cause; but certainly the right of the original shipper to the property had, by his indorsement of the bill of lading, passed to Messrs. Peacock; and the strict consequence of this argument would be that no party could be a suitor. It was contended, and rightly, that before the passing of the 18 & 19 Vict. c. 111, s. 1 (Bills of Lading Act), neither Messrs. Bell nor Messrs. Peacock could sue in this Court; and that under the true construction of that act, it was not the indorsement of the bill of lading, but the vesting of the property, which gave to the consignee of goods the rights of the original shipper, with respect to the contract contained in the bill of lading. The cases of *Smurthwaite v. Wilkins* (1), *The St. Cloud* (2), *The Norway* (3), were cited in support of this contention.

I am of opinion that the interest in the bill of lading conferred by the shipper's indorsement upon Messrs. Peacock has not been divested out of them, and that under the 6th section of the 24 Vict. c. 10 (the Admiralty Court Act), the Messrs. Peacock are properly suitors in this cause. It may be convenient now to consider the question of law which has been raised with respect to the charter-party. It has been maintained by the counsel for the plaintiffs

(1) 11 C. B. (N.S.) 842.

(3) *Brow. & Lush.* 377.

(2) *Brow. & Lush.* 4.

(4) *Ante*, p. 106.

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that they were no parties to the charterparty, and that it cannot affect them, unless it be incorporated in the bill of lading; and that the reference to the charterparty in the bill of lading is too limited and partial to admit the incorporation of the words in the charterparty relating to the demurrage, and "the usual place of discharge." In support of this proposition, the case of *Russell v. Niemann* (1) was relied upon.

I am of opinion, however, that according to the true canons of construction, the charterparty is incorporated in the bill of lading to the extent for which the defendants contend. Whether by this incorporation the law applicable to this case is in any way materially affected will appear hereafter. The question is whether, in an open charterparty, to deliver a cargo at Sunderland, the terms "usual place of discharge, and according to the custom of the port," do or do not authorize the captain, having received no notice from the consignees, to take the ship into the South Dock, and to refuse to remove her from thence until he has been reimbursed the expenses incurred by entering the South Dock. That I understand to be the principal question upon which the judgment of this Court is sought. In reality it involves two questions: first, the true construction of the words to which I have adverted in the charterparty; secondly, the right of the captain to refuse, when ordered, to remove the ship to the dock indicated by the consignees.

First, then, with regard to the true construction of the words "usual place of discharge, and according to the custom of the port." It is not necessary to recapitulate, in detail, the evidence. The fair result of it appears to be as follows—that Gill Port is a usual place of discharge for pit props destined for the collieries of Lord Durham, but that it is not the usual place of discharge for this particular cargo. The purchaser of this very cargo of the *Felix* admitted that the South Dock was the place in Sunderland in which most pit props were discharged. It was also proved that, when a vessel with this cargo was expressly chartered for the Gill Dock, a larger freight was paid.

I am of opinion that the plaintiffs have not proved the Gill Dock to be the usual place of discharge, nor do I think that they

(1) 17 C. B. (N.S.) 163.

derive any advantage from the additional words, "and according to the custom of the port." It may be observed that the *Felia* was a foreign vessel, under a foreign master, and not a vessel coming from Scotland with this peculiar cargo of pit props.

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The custom, so far as any custom at all is established by the evidence, would appear to be one of this description—that in cases of vessels freighted with this cargo with an open charter, it is usual for the consignee to send his water clerk to meet the vessel coming into the port, with directions as to the dock into which she is to be moored; that a further precaution is also sometimes taken of putting up a paper in the window of the pilot's office, containing the necessary instructions. But it is not proved to my satisfaction that in the absence of such instructions conveyed by either mode it is the duty of the foreign master to lie in the river for a reasonable period awaiting the arrival of such instructions. Assuming, therefore—as I think I am bound to do on the evidence—that the foreign master acted without bad faith in going into the South Dock in the first instance, I am of opinion that he was not to blame for doing so. The case of *Brereton v. Chapman* (1) has established that the lay days allowed by a charterparty for a ship's discharge are to be reckoned from the time of her arrival at the usual *place* of discharge, and not at the *port* merely, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge. Such being the law, I should be of opinion that the "lay," or working days, had begun when the *Felia* came into the South Dock, if she had begun to discharge her cargo before she received any directions from the consignees to go to the Gill Dock; but this was not the case. While she was in the very act of mooring, her master received these directions, and refused to obey them, except under the condition of being reimbursed the expenses which he had incurred by entering the South Dock. I understood it to have been admitted, though this statement is perhaps too favourable to the master, as the evidence scarcely supports the position that he ever made a *bonâ fide* offer to go to Gill Dock if his expenses were paid, that if this payment had been tendered it would have been the duty of the master to have

(1) 7 Bing. 559.

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obeyed the orders of the consignee; though I think it was maintained by Mr. Butt that even if the master had been apprised before he entered the South Dock that he was to discharge in the Gill Dock, he would have been justified under the charterparty, in refusing to do so. I am of a contrary opinion.

The only question which remains is, whether it was not the duty of the master to obey the order of the consignee to go into the Gill Dock and there discharge his cargo, reserving to himself the right of recovering by legal process against the consignee the expenses which he had incurred in the South Dock. Gill Dock, it must be observed, was certainly a place of discharge, and one to which the *Felix* might have safely gone; it was the dock in which Messrs. Peacock had bound themselves to Messrs. Bell that the cargo should be delivered. It was moreover fairly argued that these pit props are bought to sell under an open charterparty, because purchasers do not know at the time of the purchase where the cargo is to be sent; whereas when they are bought by the coal owners for themselves, the place of discharge is usually specified in the charter. But this question ought to be determined apart from this particular consideration, and upon general principles. I am of opinion that upon general principles, upon which Lord Kingsdown truly says for the sake of the public interest questions of general mercantile law should be decided, *Kirchner v. Venus* (1), it was the duty of the master, in the circumstances stated, to have obeyed, when he did receive it, the order of the proprietor of the cargo. The charterparty being open, the place of discharge has necessarily to be supplied. It cannot, I think, be reasonably contended that a foreign master entering this port perhaps for the first time was entitled to select the docks which he considered to be "the usual place of discharge," and to disregard the direction of the proprietors of the cargo as to the dock in which their interests required that the cargo should be delivered.

Proctor for plaintiffs: *Stokes*.

Proctors for defendants: *Rothery & Co.*

(1) 12 Moo. P. C. at p. 398.



## [ARCHES COURT.]

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June 4.

THE BISHOP OF NORWICH *v.* PEARSE.*Criminal Suit—Evidence of Defendant—14 & 15 Vict. c. 99, ss. 2, 3.*

In a criminal suit against a clergyman under the Church Discipline Act (3 & 4 Vict. c. 86), the defendant is, since 14 & 15 Vict. c. 99, ss. 1 and 2, competent and compellable to give evidence.

*Burder v. O'Neill* (9 Jur. N.S. 1109), dissented from.

THIS case was brought before the Court by Letters of Request, under the Church Discipline Act, from the Bishop of Norwich, who was the voluntary promoter of his office, against Robert Wilson Pearse, a clerk in his diocese, and the rector of Gaywood, in the county of Norfolk. The articles contained three charges of indecent and obscene conduct on the part of the defendant with three young men.

At the hearing of the cause, on the 25th and 26th of May, the defendant was examined and cross-examined.

The question was whether the clerk was competent to give evidence.

*Dr. Deane, Q.C.*, and *Dr. Tristram*, appeared for the Bishop of Norwich.

*Serjt. Ballantine, Dr. Spinks, Q.C.*, and *Dr. Middleton*, for the defendant.

*Cur. adv. vult.*

JUNE 4. SIR ROBERT PHILLIMORE. The hearing of this cause has been attended with one remarkable circumstance. It furnishes, practically speaking, the first instance in which the accused clerk has been allowed to give his own personal evidence as a part of his defence. It is right that I should state fully the grounds upon which I came to the conclusion that such evidence was admissible; because the consequences of this decision, if it be correct, are obviously very important. It materially affects for good or for evil the administration of justice in these proceedings against criminous clerks. In my opinion the protection of innocence and the detection of guilt is promoted by the admissibility of this evidence, and

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the discovery of the truth—the proper end, I think, of all rules of evidence and legal procedure—facilitated. But such, I regret to say, was not the opinion of my distinguished predecessor in this seat, and this fact alone would render a statement of the reasons for a contrary opinion imperative upon me.

The question stands in this way. In the year 1843 was passed Lord Denman's memorable act (6 & 7 Vict. c. 85) for improving the law of evidence, and it began in language which never ought to be forgotten: "Whereas, the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgments on the credit of the witnesses adduced and on the truth of their testimony: Now therefore be it enacted by the Queen's most Excellent Majesty, &c., that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by depositions, according to the practice of the court," &c.

And so stood the law for a considerable time, but in the year 1851 progress was made in this department of jurisprudence and the 14 & 15 Vict. c. 99, called "An Act to Amend the Law of Evidence," by the 2nd section, enacted as follows: "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court on behalf of either or any of the parties to the said suit, action, or other proceeding."

It is perfectly clear, therefore, from the general terms of this enactment that all parties to suits were rendered capable and compellable to give evidence, except as hereinafter excepted, and the exceptions are to be found in the following sections. The 3rd section is: "Nothing herein contained shall render any person

who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." And the 4th section is: "Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law or in any ecclesiastical court or in either house of parliament instituted in consequence of adultery or to any action for breach of promise of marriage."

Subsequently to the passing of these acts the legislature has rendered it competent in the Divorce Court for the husband and the wife, if the suit be instituted in a particular manner, to give evidence in cases of adultery, and in cases of cruelty and impotency their evidence is continually admitted.

Now, my very learned and very distinguished predecessor, Dr. Lushington, in giving judgment in the case of *Burder v. O'Neill* (1) after hearing arguments from me (I think Sir Robert Collier was opposed to me upon that occasion) on the admissibility of the evidence of an accused clerk, referred to these statutes which I have just referred to (it was in the year 1863), the 14 & 15 Vict. c. 99, and then said:—"Assuming for the moment that the general terms used in this section would apply to the present case and operate standing alone, to make the evidence of Mr. O'Neill admissible, what is the effect of the 3rd section? By that no person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, shall be competent or can be compelled to give evidence for or against himself. Now I think it is by no means clear that the offence charged in these articles is not an indictable offence, or punishable on summary conviction. Looking at the pleadings and evidence, I incline to the opinion that it is so indictable or punishable. If I am right in this opinion, it will follow that I also did right in rejecting the application to examine Mr. O'Neill; for,

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(1) 9 Jur. N.S. 1109.

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according to the very words of the section, he is not a competent witness, and if not competent no consent or waiver of objection can make him so. But suppose I am in error in taking this view of the 3rd section, I fall back upon the 2nd section, and I have come to the conclusion that the operation thereof does not extend to make Mr. O'Neill, or any other person in his situation, a competent witness; and I adhere to this construction on the principles and authority of the case of *Hawkins v. Gathercole*. (1) Let me for a moment consider the consequences of holding that Mr. O'Neill is a competent witness. By the 2nd section of the statute, if he be a competent witness, he is also compellable to give evidence the effect of which will be that in a case resembling the present, in which character and pecuniary prospects are at stake, in which practically the issue is, whether the accused shall be disgraced and ruined, the accused may be compulsorily put upon his oath, and be compelled to take his choice between perjury or ruin. I cannot conceive that any proceeding could take place more utterly repugnant to the principles and practice of British law. But this is not all: the effect of finding Mr. O'Neill to be a competent witness, and consequently to be compelled to give evidence, will be to repeal the statute 13 Charles 2, c. 12, s. 4, by which the ecclesiastical courts are prohibited from administering an oath to any one, whereby such person may be charged, or compelled to confess, or accuse or to purge him or herself of any criminal matter or thing. I do not think that this statute is repealed. There is one more consideration. Look at the exception in the 3rd section, and see the utter discrepancy which would arise in principle if such evidence could be given. A man is protected from giving evidence against himself in all petty offences cognizable by a magistrate, however small the penalty or slight the punishment on conviction; but if I be mistaken, a clergyman of the Church of England will not be exempted where the penalty may be disgrace and the loss of valuable preferment. It is true that possibly such an anomaly may exist, but sure I am that if legal principles will permit, every court would be most anxious to avoid it. I am of opinion that even if the words of the 2nd section could be so construed as to render the evidence admissible, the expressions are only general,

(1) 6 De G. M. & G. 1. *Im 25401*



and not specific. I again say, that acting on the principles laid down with so much clearness in *Hawkins v. Gathercole*, and for the other reasons I have given, I adhere to my original ruling, and refuse to admit Mr. O'Neill's evidence." In a subsequent case, that of *Berney v. The Bishop of Norwich* (1), February 5th and 8th, 1867, in which as counsel for the accused clerk, I brought to the attention of the Judicial Committee of the Privy Council this ruling of my learned predecessor as my reason for not having examined Mr. Berney upon a point as to which his evidence would have been very material, their Lordships, in the course of judgment which they delivered, observed that this question perhaps required re-consideration.

This is the first case which has happened since that observation was made, and I have thought myself, not only authorized, but bound to reconsider the question. In the first place, therefore, I think that the plain and true construction of the 14 & 15 Vict. c. 99, does not leave me at liberty to discuss the question of the expediency of admitting the evidence in question. As I read that statute, the first clauses render all parties in all suits competent witnesses. The latter clauses contain the catalogue of exceptions to the principles of general admissibility. In that catalogue parties to criminal suits in the ecclesiastical courts are not enumerated, and are therefore admissible as witnesses. But it is said, that if this proposition be generally true, it does not apply to cases where the offences charged against the clerk, are, like the present, indictable or punishable by summary conviction. But again, I am obliged to dissent from this construction of the statute. I think that the words "in any criminal proceeding," refer to proceedings in which the Crown, as guardian of the public weal, is prosecutor; and not to suits which the common law denominates "criminal," and in which the prosecutor is the ordinary, or the promoter of his office, especially having regard to the words of the 4th section. Another objection is, that the statute of 13 Charles 2, c. 12, is a special statute which forbids the examination of parties to these criminal suits, and the authority of Lord Justice Turner, in *Hawkins v. Gathercole*, for the position that a special statute can only be repealed by a special statute, is relied upon. The statute

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(1) Not reported.

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of 13 Charles 2, c. 12, is thus entitled: "An Act for Explanation of a Clause contained in an Act of Parliament made in the seventeenth year of the late King Charles, intituled 'An Act for Repeal of a Branch of a Statute primo Elizabethæ concerning Commissioners for Causes Ecclesiastical.'" And it then recites that errors had arisen by the repeal of the statute relating to the Commissioners for Causes Ecclesiastical, that is, the repeal of the statute which authorized the High Commission Court, and the 4th section is thus:—"Provided also, and it is hereby further enacted, that it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or any other person having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever the oath usually called the oath ex-officio, or any other oath whereby such person to whom the same is tendered or administered, may be charged or *compelled to confess*, or accuse, or to *purge* him or herself of any criminal matter or thing whereby he or she may be liable to any censure or punishment; anything in this statute, or any other law, custom, or usage heretofore to the contrary hereof, in anywise notwithstanding."

I have read with care the judgment in *Hawkins v. Gathercole*, which I do not think it necessary to go into at length. I will only say that I do not think that the principles of construction which that decision lays down warrant the conclusion that any restriction on the admissibility of evidence imposed by 13 Charles 2, c. 12, cannot be taken away by the language of the 14 & 15 Vict. c. 99. Lastly, the learned judge alleges the evil that would ensue if a clerk were to be allowed to give evidence "where the penalty might be disgrace and the loss of "valuable preferment." I have already expressed my opinion upon this general subject; I must add that the other side of the question does not seem to have been considered, namely, the extreme hardship, I should say injustice, of allowing a clerk to be accused of any offence, however infamous, alleged to have been committed in the presence of the accuser alone, and supported by his testimony alone, and of sealing up the mouth of the accused, who, if innocent, may give a satisfactory refutation of the charge, and who, if guilty, ought not to be protected by a technical rule from exposure, more especially in a case

where third parties, the parishioners, have a right to demand that the cure of their souls shall not be entrusted to a wicked pastor.

At this moment, in the Divorce Court, a husband accused of cruelty, which may include the commission of an unnatural crime, of impotency, of adultery, if the suit be instituted in a particular form, is a competent witness. Under what temptation is he placed to exculpate himself by perjury? In the Probate Court, Dr. Smethurst, whose counsel I was, was admitted in a case where he was the party benefited under a will, to give evidence on the subject of it, though he had been found guilty of poisoning the maker of that will, by a sentence which was afterwards remitted; and in the civil suit he was cross-examined by Mr. Serjeant Ballantine as to all the circumstances of the alleged crime—on which, when tried for his life, his lips had been sealed by the law. But the other day, a party accused of obtaining, by undue influence, nearly half a million of money from an insane testator, gave evidence in favour of the will. Under what temptations were these persons to commit perjury? Certainly, according to the reasoning in *Burder v. O'Neill*, their evidence ought to be inadmissible.

I will not pursue the subject further. In my opinion the statute renders this species of evidence in this court admissible; and I do not think that the Court should endeavour to discover an ingenious construction of the statute for the purpose of excluding such evidence on the ground of the mischief consequent on its admission; but, on the contrary, that for the sake of the administration of justice, both to the individual and the Church of which he is a minister, it ought to be ready to receive it.

Therefore, when the counsel for the defendant in this case tendered him as a witness, I overruled a formal objection made by the counsel for the promoter, and I allowed the defendant to be examined.

[After examining in detail the evidence adduced in support of the charges:—] The law which made the evidence of the defendant admissible did not of course remove those objections to its credibility which arise from the strong bias under which it must be given; it must be admitted that in this case the defendant has the very strongest motives of interest by which a man can be swayed, to deny the charges now preferred against him. On the

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other hand, the improbability that an educated gentleman, and a clergyman of mature years and long standing in his profession, should deliberately commit the sin of perjury, has been strongly urged upon me ; and it has been truly said that this sin has been committed by him if the story which he has told is untrue. The argument deserves consideration, but I am afraid that on the assumption of guilt the man who committed these various abominations, at various periods, and with deliberate purpose, must have so polluted his mind and defiled his conscience as to render the commission of the additional sin of perjury in the hope of thereby escaping the loss of character, fortune, and station, not an improbable act, certainly not an act of such manifest improbability as to induce the Court on that ground alone to discredit, much less discard, the adverse testimony. The accused clerk is indeed entitled to the full benefit of those legitimate presumptions of innocence which arise from his character, his social position, and still more, his holy calling. These presumptions are to be constantly borne in mind by the Court, and to be weighed in the same scale against the inducements to perjury, which, on the assumption of guilt, the fear of detection and of punishment would suggest.

The learned judge then proceeded to examine the evidence given for the defence, and having determined that the charges were established, pronounced sentence of deprivation against the defendant, which he directed to be certified accordingly, and further condemned the defendant in the costs.

Proctor for promoter: *Brooks.*

Proctors for defendant: *Clarkson, Son, & Greenwell.*



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June 9.

*Bottomry Bond on Ship, Freight, and Cargo—Validity of where given to meet Expenses already incurred—Duty of Master to Communicate with Owners of Cargo—Advance of Freight—Loan on Freight.*

It is the duty of the master before resorting to bottomry to communicate, or to endeavour to communicate, with the owners of the cargo as well as with the owners of the ship, if, in the circumstances, it be feasible.

Where a master fails to obtain funds from the owner to pay for repairs which the necessities of the ship compel him to order, he is warranted in raising money on bottomry of ship, freight, and cargo for that purpose from persons other than those who had supplied such repairs.

In the case of a bottomry bond for money already supplied without any previous agreement, it is to be presumed, in the absence of all evidence, that the foreign lender made his advances in contemplation of bottomry security, and this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand.

The question whether money advanced is to be considered a loan or an advance of freight must principally depend upon what appears upon the face of the instrument.

THIS was a cause instituted by the legal assignees of a bottomry bond granted by the master of the *Karnak* upon ship, freight, and cargo.

The amount of money borrowed under the bond was 3228*l.* 7*s.* 2*d.* No opposition having been offered to the bond by the owner of the ship, the ship had been sold, and produced 512*l.* 11*s.* 9*d.* The Court had pronounced for the validity of the bond so far as it regarded the ship and freight. The freight amounted to the sum of 1356*l.* 14*s.* 6*d.*, or, as stated by the defendants, 1324*l.* 16*s.*

The defendants, the owners of the cargo, paid into court the sum of 628*l.* 15*s.* 2*d.*, and retained in their hands the sum of 727*l.* 19*s.* 2*d.*, which they claimed to deduct on the following grounds, namely, the sum of 632*l.* 14*s.* 2*d.* in respect of an alleged advance of freight made to the master of the *Karnak* at Galveston, and the sum of 61*l.* 6*s.* 9*d.* for interest and insurance on the alleged advance, and the sum of 33*l.* 18*s.* 4*d.* as being due to the defendants for commission on the charterparty. The defendants also denied altogether the validity of the bond so far as it affected the cargo.

The plaintiffs prayed the Court to order the sum of 727*l.* 19*s.* 2*d.* to be paid to them, or such part thereof as the Court should think

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The brigantine *Karnak*, of 267 tons, sailed from Galveston, in Texas, for Liverpool on the 24th of December, 1866, laden with 720 bales of cotton, under a charterparty from Droege & Co., of Galveston, whereby the vessel was consigned to the order of a firm bearing the same name of Droege & Co., of Manchester: the vessel was to carry a "complete underdeck cargo of compressed cotton," and the charterers undertook to pay freight as follows:—"After unloading and right delivery of cargo at Liverpool, at the rate of seven-eighths of one penny British sterling per pound weight delivered, and five per cent. prime, without any deduction for interest. The master also signed open bills of lading for the cargo. Before sailing, he received the sums of money from Droege & Co., of Galveston, claimed as advances of freight. After leaving Galveston, he was compelled by bad weather, during which he lost nearly all his sails, spars, and rigging, to put into Bermuda on the 17th of January, 1867. Acting on the advice of Hyland & Co., agents for the American Lloyd's, he had the ship and cargo surveyed, after which 580 bales of cotton were landed and warehoused. A day or two after his arrival at Bermuda he wrote a letter to a Mr. Meek, to whom, as agents for Droege & Co., of Manchester, he had received a letter of introduction from Droege & Co. of Galveston. He supposed at that time that the Manchester Droege & Co. were the consignees of the cargo as well as of the ship. He sent his letter by a sailing vessel bound from Bermuda to Boston or New York. He wrote also to the managing owner of the vessel at New York, a Mr. Johnson, as follows:—

"St. George's, Bermuda, January 29, 1867.

"Wm. Johnson, Esq.—Dear Sir,—I have written to Messrs. O. K. King & Co. on my arrival in this port some ten days ago, informing them of my disaster and the condition of the *Karnak*. The cargo is nearly discharged, and the vessel will be ready in a few days to go on the slip. There is not much of the cargo damaged, so I will reship all again. If you wish the vessel re-

metalled here, you had better write as soon as possible; but I think it would be better to have it done in Liverpool, as it can be done much cheaper. I had some trouble in getting spars here. I had to go to the navy yard and get them and the standing rigging. I wish you would come to this port as soon as you can. I will do all that I possibly can for your interest and all concerned. The slip will not be disengaged for a week from this date, owing to so many vessels in distress ahead of the *Karnak*. There is in this port at present nineteen sail in distress. I will send a copy of survey and protest as soon as possible. The steamer *Worcester* from Liverpool, bound for Baltimore, put into this port in distress and will sail this afternoon for said port. Please write by first chance.—Yours respectfully, “Geo. S. Locke.”

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The captain further stated in his evidence that he wrote to Johnson on every opportunity afterwards; that before the bottomry bond was executed, Messrs. Hyland & Co. issued circulars bearing his signature, inviting tenders for a loan on bottomry of ship, freight, and cargo; that the circulars were issued to the principal merchants and moneyed men at Bermuda, but the money was not advertised for in the newspapers; that after he communicated with the managing owner at New York, he expected to receive money from him, and it was not until after he had written to him several letters and received no answer, that he felt himself under the necessity of borrowing money on bottomry, and it was then too late to get money from England, even if he had known from whom he could get money in England; that before he took up money on bottomry he wrote to the owner at New York, telling him that he should have to do so; that letter was one of the last he wrote to the owner; that the sending the letter by the sailing vessel to New York or Boston was then the readiest way of communicating with England; that he could not have raised the necessary money by bond on ship and freight only; that he did his best to obtain the money on the most reasonable terms he could; that if he had not borrowed the money on bottomry the vessel would have been arrested and sold; that it was in order to prevent the arrest of the vessel, and to prosecute his voyage, that he had recourse to bottomry; he did not write from Bermuda to Droege & Co.

1868      at Galveston; no legal proceeding had been commenced to arrest  
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The evidence of Mr. Bluck was as follows:—

“That the advance made by me to the master of the brig *Karnak*, on the security of the bottomry bond in question in this cause, was so made in compliance with a written application received by me on or shortly after the date thereof from the master of the *Karnak*, which was as follows:—

“‘Circular.

“‘St. George’s, 4th April, 1867.

“‘Sir,—I am desirous of obtaining two thousand pounds to defray the outfits and disbursements of the brig *Karnak*, of Nassau, N. P., at this port hence to Liverpool; the *Karnak* is seven years old, rates A 2, good in every respect, a staunch sound vessel, and has had a thorough repair at this port. Her cargo consists of 720 bales of cotton, with a freight list of about 1400*l.*, and will be ready for sea on or about the 11th inst. I will therefore be glad if you will inform me not later than Monday noon, 8th inst., whether you will advance the said amount, to be secured on vessel, cargo, and freight by a bottomry and respondentia bond, and at what rate of premium of maritime interest.—I am, Sir, your obedient servant,

‘George S. Locke, master.’

“‘John Bluck, Esq., Hamilton.’

That I agreed to advance the amount required, which was not then accurately ascertained, upon the faith of the representation contained in the said circular, and I was not informed by the master of the *Karnak* either before or after making such advance, nor was I aware that a portion of the freight mentioned in the said circular had been then already paid, and could not be pledged by the said bond; but I understood that the whole amount thereof was pledged to me as a security for the advance so made by me. That in answer to inquiries made by me as to the necessity for an advance on bottomry I was informed—and having reference to the circumstances of the case—I believed that it was necessary, and for the benefit of all concerned, that the money required should be at once advanced, and that the claims against the *Karnak* should be discharged, and that she should be enabled to resume her journey. That previously to making the advance in question, I made parti-



cular inquiries as to the state and condition of the *Karnak*, and I ascertained that she was in good repair, with new sails, and to all appearance a valuable vessel; and I believed that the said vessel, together with the said freight, would be of a value, and would, if necessary, realize sufficient to pay and discharge the whole amount required to be advanced. That immediately after the said bond was executed, I transmitted it to the plaintiffs in England, together with the following letter:—

“Hamilton, Bermuda, 18th April, 1867.

“Messrs. Stuart & Simpson.—Gentlemen,—Herewith you have duplicate of the 12th inst. I now hand you bottomry bond on the brig *Karnak*, with bills on Messrs. Droege & Co., Manchester, for the sum of three thousand two hundred and twenty-eight pounds seven shillings and threepence (3228*l.* 7*s.* 3*d.*), being twenty per cent. on the amount advanced, with the understanding that five per cent. shall be deducted from the money advanced, say 134*l.* 10*s.* 4*d.*, if the bills are duly honoured; if not, then the whole amount of the bond to be paid. The bills are drawn on Messrs. Droege & Co., Manchester, at sight, Mr. John Meek being their agent at Liverpool. The freight of the cotton is upwards of 1400*l.*; the amount, when received, you will place in Messrs. Barclay & Co.’s hands.—I am your obedient servant,

“‘John Black.’”

Mr. Higgs, a merchant of Bermuda, gave evidence to the effect that the value of the *Karnak*, after the repairs, was 1800*l.* or thereabouts, and that, apart from casualties, she would have been worth that sum on the termination of her voyage to England; and Mr. Emery, a Liverpool merchant, stated that if the *Karnak* had been sold soon after her arrival at Liverpool instead of at London, she would probably have realized a larger sum than she did.

It was further proved that, by the law of Bermuda, those who repaired the ship and supplied the necessaries had a lien upon the ship, and might have arrested her.

May 13. *Mellish, Q.C.*, and *Clarkson*, for the plaintiffs. The objections to the validity of the bond are, first, that the master did not communicate with the owners of the cargo; secondly, that the advances on bottomry were made after all the expenses and charges had been incurred. The evidence shews that the master

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communicated with the owners of the ship, and expected that they would supply him with funds; and that it was not until the ship was very nearly ready for sea that he for the first time found that he must have recourse to bottomry; and taking into consideration the amount of the freight and the estimated value of the ship, the master had no reason to expect that more than a small portion, if any, of the money raised would fall upon the cargo.

There is no absolute rule making it obligatory upon the master to communicate with the owners of the cargo, but the particular circumstances in each case are to be considered: the *Hamburg* (1); the *Lizzie*. (2) In this case the master exercised a wise discretion in not waiting to communicate with the owners of the cargo, which consisted of cotton, the market for which was falling, and a fall of one halfpenny a pound would have represented a loss of between 700*l.* and 800*l.* in the whole cargo. In fact, it will be found that, even after the cargo has contributed to payment of the bond, it has actually benefited by having been brought to its destination through the instrumentality of that bond, without a longer delay at Bermuda.

As to the second objection, it is conceded that one who has made advances on personal credit cannot afterwards require a bond to secure such advances, but it is perfectly lawful for the master, having obtained advances from A. for the necessary purposes of the ship, to borrow money from B. for the purpose of paying A.: the *Hebe*. (3) In this case it is proved that, by the local law, the persons who had done the repairs and supplied the necessaries had a lien on the ship in respect of their claims, which lien they might have enforced by seizure and sale of the ship. This would have been, of itself, sufficient ground for resorting to bottomry: the *Prince George*. (4) As to the sum of 727*l.*, the charterparty does not provide for an advance of freight, and the master had no authority to receive any part of the freight: the *Salacia*. (5) Moreover, the nature of the transaction appears on the face of the receipts, which shew clearly that the advance was intended to be by way of a loan to the master on the security of the freight.

(1) Brow. &amp; Lush. 253.

(3) 2 Wm. Rob. 146.

(2) Ante, p. 254.

(4) 4 Moo. P. C. 21.

(5) Lush. 545.

*Sir W. B. Brett, Q.C. (S.G.), and Cohen*, for the defendants. The repairs had been executed and the expenses incurred before any attempt was made to raise money by bottomry, for the bond was executed only one day before the ship sailed, and it is not pretended that the repairs were executed or the expenses incurred with a view to bottomry. The debts were incurred, not with one, but with several tradesmen. This case is different from those in which an agent advances money in order to procure necessities or repairs: it may well be that the repairs were executed by the tradesmen in the belief that they could arrest the ship; but, in fact, the master alone had pledged his credit for the repairs, and the tradesmen certainly did not expect bottomry bonds to be executed to each of them, and did not do the repairs in contemplation of bottomry; the question, therefore, as to whether money was advanced in contemplation of bottomry does not arise in the present case. The question here is simply whether a person who advances money on bottomry of cargo to enable a master to pay off a debt already incurred for repairs completely executed, can enforce his bottomry bond in a case where the tradesmen who executed the repairs might have arrested the ship. In such a case a bottomry bond, even on ship, could not be enforced. A bottomry bond cannot be enforced for anything which is not a necessary: the *North Star* (1); the *Edmond* (2); the *Prince George* (3); the *Hersey* (4); the *Ariadne* (5); the *Osmanli*. (6)

As to what constitutes a necessary: *Beldon v. Campbell* (7); the *Gosfabrick* (8); *MacLachlan on Merchant Shipping*, p. 137; *Parson's Maritime Law*, p. 423; the *Aurora*. (9) The plaintiffs must maintain that money supplied for liberating a ship from arrest is a good item, or that, if a ship is threatened with being taken in execution, in such a case a bottomry bond given is good; but that proposition is directly negatived by the *North Star* (10), the *Hersey* (11), and the *Laurel*. (12) But even if in such a case a bottomry bond on ship were good, a bottomry bond on

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(1) Lush. 45.

(2) Lush. 57.

(3) 4 Moo. P. C. 21.

(4) 3 Moo. P. C. 79.

(5) 1 Wm. Rob. 411.

(6) 3 Wm. Rob. 198.

(7) 6 Ex. 886.

(8) Swab. 344.

(9) 1 Wheaton, 96.

(10) Lush. 45.

(11) 3 Moo. P. C. 79.

(12) Brow. &amp; Lush. 191.

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cargo would be bad ; the mere fact of the arrest of the ship is not enough : the *Osmanli*. (1) It must be arrested for a debt due to a person who gave credit to the ship ; why then should a bottomry bond on cargo be good to a person who did not give credit to the cargo, and could not have arrested the cargo ? The *Hebe* (2) cannot be considered an authority ; it was decided generally, and not even with reference to the *lex loci* making the ship liable to be arrested ; besides, it goes too far, for it is said there that the master might take up money on bottomry to pay debts not incurred for necessities ; this is clearly wrong : it is only in a case of necessity that the master can make a bottomry bond. But the *Hebe* does not apply to this case ; it was not a case of bottomry on cargo.

No communication was made with the shipper or consignee of cargo. Consider the position of the owner of the cargo if this bond be held good. He cannot receive this money from his underwriters, for it is not general average ; nor is it particular average : *Rosetto v. Gurney* (3) ; *Maclachlan on Merchant Shipping*, 559 ; *Benecke's General Average*, 257. Before, therefore, the owner of cargo is held liable to pay this bond, the plaintiffs should make it perfectly clear that it was absolutely necessary to hypothecate the cargo without communicating with the owners, and that such necessity arose from a proper consideration of the interests of the owners of the cargo ; and this, it is submitted, the plaintiffs have failed in establishing.

*Clarkson*, in reply. There is considerable obscurity in the term "personal credit," as used with regard to bottomry transactions. If by "personal credit" is meant an express agreement to advance to the master, upon the security of a bill to be drawn by the master on his owners, or on his own promise to pay, without in any manner attempting to have recourse to the ship, the term becomes easy in its application to the decided cases. Indeed, it will be found that in all the cases where the bond sued on has been held to be invalid on the ground that the advances had already been made on personal credit, the term "personal credit" has been used in this sense. In those cases the bond had been

(1) 3 Wm. Rob. 198.

(2) 2 Wm. Rob. 146.

(3) 11 C. B. 176.



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held invalid, not because the ship was not in a position in which the master might have given a valid bond, but because the taker of the bond had placed himself in a position in which it would be inequitable in him personally to require and take a bottomry bond after having expressly agreed to advance on personal security, that is, not to require a bond; he would be acting directly contrary to his agreement by requiring a bond. But there is nothing inequitable in the advancing to the master on bottomry a sum to enable him to pay others the amount of their advances to the master previously made for the necessary purposes of the ship, and it is proper and reasonable that the master should pay those debts before sailing away; where the lender on bottomry has not by any previous agreement placed himself under a disability to take a bond. It was on this principle, no doubt, that the judgment in the *Hebe* (1) proceeded. In the *North Star* (2), the principle laid down in the *Hebe* is referred to by Dr. Lushington as law. Consider what would be the position of the master, and whether it would be for the general interests of commerce to lay down a contrary principle. It is obviously the duty of the master, and for the benefit of his owner, to carry out the voyage with as much expedition as possible, and with that view to get repairs done immediately. He cannot tell with certainty until sufficient time for communication has elapsed whether his owner will or will not put him in funds. Is he to wait until he has ascertained whether he will or will not have to raise money on bottomry before taking any steps with regard to getting the ship repaired? If he is to wait, see what a ruinous delay would be occasioned. If he is not to wait, then what would he have to do? Not being absolutely certain that he would have to resort to bottomry, he would have to obtain a provisional agreement for a loan on bottomry, that is to say, he would have to get some one to agree to advance him money on bottomry, if he should at any time before the sailing of the ship require it; an arrangement which would compel the proposed lender to hold himself in funds to meet the master's requirements, in case the master should, in the exercise of his option, require the advance, and this would be an extra accommodation, for which the borrower would in extra premium, or otherwise, have to pay.

(1) 2 Wm. Rob. 146.

(2) Lush. 45.

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Again, until the repairs and supplies have been nearly completed, it is practically impossible to form any close estimate as to the sum total of the required advance. It is submitted, upon the authority of the *Hebe* (1), and upon principle, that this bond is perfectly good apart from the fact that the local law gave a lien to the shipwrights and other tradesmen for their respective bills; but assuming the Court so far to be against the validity of the bond, yet it is proved in this case that the shipwrights and other tradesmen had, *primâ facie* by the local laws, liens on the ship for their respective claims, which they might have enforced by seizure and sale of the ship. It is not suggested that they ever agreed in any way not to press their liens; and on the authority therefore of the *Alexander* (2) and the *Vibilia* (3), each of these tradesmen might have taken a bond for the amount of his claim, and a maritime premium; and can it be said that under such circumstances the master was not authorized to borrow money from one individual on bottomry for the whole amount, and so avoid the extra expense of a great number of bottomry bonds? It is submitted, moreover, that the mere fact of the ship being liable to arrest was a sufficient necessity for the bond: the *Prince George*. (4) None of the cases cited in opposition to the principles in the *Prince George* are in point, inasmuch as in this case the whole of the debts were the just debts of the ship, incurred in the very voyage in which the bond was given. *Beldon v. Campbell* (5) has really no bearing on the present case.

*Cur. adv. vult.*

June 9. SIR ROBERT PHILLIMORE [after stating the facts as above]:—The legal argument urged by the defendants against the validity of this bond took a very wide range; and during the course of it the general elementary principles upon which these instruments of hypothecation are founded, and many cases in which it was suggested that the decisions were not in perfect harmony, were discussed.

I have thought it right to consider carefully these principles, and what has been said with respect to them by text writers of

(1) 2 Wm. Rob. 146.

(2) 1 Dodson, 278.

(3) 1 Wm. Rob. 1.

(4) 4 Moo. P. C. 21.

(5) 6 Ex. 886.

eminence, and also the chief judgments relating to the subject which have been delivered in this Court and in the Court of Appeal. It was necessary to do so, inasmuch as this part of the law merchant has been, in truth, built up slowly and at intervals in this country, principally by the judges of these Courts, who have derived the materials for their decisions from examining the reason of the thing which rendered these instruments necessary for the interests of commerce, as explained and illustrated by the usages and laws of maritime states and the writings of commentators, having regard at the same time to certain peculiarities of the law in this country with respect to maritime liens; and the result has been, to use the language of Lord Stowell, "that bonds of hypothecation are of a very high and privileged nature. They were invented for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the master and the owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their cargoes must be left to perish. It is important, therefore, to the interests of commerce that bonds of this kind should be upheld with a very strong hand, and accordingly they have at all times been so upheld by this Court, when they appear to have been entered into *bonâ fide* and without any suspicion of fraud": the *Alexander*. (1)

In the language of the Judicial Committee of the Privy Council, "bottomry bonds for the benefit of the shipowners and the general advantage of commerce are greatly favoured in Courts of Admiralty, and where there is no suspicion of fraud, every fair presumption is to be made to support them": the *Prince George*. (2)

In this, I believe, as in almost all the reported cases, the Court has to deal, not with the authority of the owner, but of the master, to make a bottomry bond.

This power of the master arises out of his relation as agent both to the owner of the ship and to the owner of cargo. A material distinction, indeed, exists between his authority as agent for the one and as agent for the other, but in both cases his power to hypothecate, like his power to sell, arises out of the necessity of the case.

Lord Stowell says, "Necessity creates the law. It supersedes

(1) 1 Dodson, 278.

(2) 4 Moo. P. C. at p. 28.

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the rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects."

Upon this cardinal principle, that necessity is the foundation of the master's authority in the matter, several limitations of that authority, as the law has been developed, have been established.

Among them the following are pre-eminent:—

The master must endeavour to raise funds on the personal credit of the owners. The authority of the master is derived "ex tacito mandato," as Bynkershoeck says; and if the owner be on the spot, according to the general law, the master has no authority to bottomry (Boulay Paty, 11, 271); and if the owner be absent, it is the duty of the master to endeavour to communicate with him before bottomry be resorted to.

The money must be raised to defray the expense of necessary supplies or repairs of the ship, or to enable—and this, it will be seen, is a wider and more difficult proposition—the ship to leave the port in which he gives the bond, and to carry the cargo to its destination.

With reference to this proposition much discussion has arisen whether the liability of the ship to detention, according to the *lex loci*, justifies a master in giving a bottomry bond, and the authorities upon this point are supposed to be conflicting. And, again, there arises a question whether the liability to detention must not be on account of necessities furnished to the ship in order to enable her to prosecute her homeward voyage, or whether this liability may arise from any other cause, such as for old debts incurred antecedently to the voyage, or for damage done to the outward cargo in unloading at the port, or in some other manner; and, again, whether the liability of the master to personal detention justifies the creation of the bond.

Another important principle established by the judgments is sometimes expressed in this language—that the money must have been advanced in contemplation of a bottomry security, or, in other words, "upon the credit of the ship": the *Alexander*. (1)

This proposition appears to me to have been somewhat loosely stated, for, apart from verbal or written statement or agreement, it



would seem difficult to prove whether the lender or the borrower did or did not mentally contemplate hypothecation at the time when the expenses were incurred. 1868  
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It must, however, be taken to be ruled law that a creditor who has furnished repairs upon personal credit cannot afterwards convert the personal debt into a bottomry transaction; and, on the other hand, that a bond executed after advances have been made, if in pursuance of an agreement for bottomry, is valid, and that an agent who has advanced money upon personal credit may take a bottomry bond for advances subsequently supplied. There is more difficulty as to the law in the case of a bottomry bond for money already supplied without any previous agreement at all; but I am of opinion that, in the absence of all evidence, the presumption must be that the foreign lender made the advances in contemplation of a bottomry security, and that this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand.

I will now endeavour to apply some of these principles of law to the circumstances of the case before me, and I will take the arguments advanced by the counsel and the various cases adverted to in what appears to me to be their natural order. I will address myself first to those which relate to the validity of the bond so far as it affects the ship and freight, and next as to the validity of the bond in its relation to the cargo.

First—Is this bond bad because there was no necessity to raise money on bottomry, on the ground that it could have been obtained on the personal credit of the owner? I am of opinion that, according to the evidence before me, he could not have raised the necessary funds except on bottomry bond. It has not, I think, been contended that the repairs and supplies were not necessities.

Secondly—Is the bond bad because given for the purpose of raising money to pay for repairs already executed? or, as the same proposition was stated in another form, does the fact that these repairs were already executed take them out of the category of necessities for which it is competent to the master to bottomry his ship? I am of opinion that the bond is not bad upon this ground. The tradesmen who effected the repairs or furnished the supplies were not the takers of the bond, nor is there any question in this

1868 case whether a transaction done on personal credit can be converted into bottomry. If there were, I should hold, on the authority of the *Augusta* (1); the *Vibilia* (2); the *North Star* (3), that the bond was bad. The question here is whether the master, having failed to obtain funds from the owner to pay for repairs which the necessities of the ship compelled him to order, was not warranted in raising money for this purpose from a person other than that or those who had supplied such repairs. Upon principle it would appear to me that it must be competent for him to do so; an incalculable amount of inconvenience and injury to commerce would flow from an opposite doctrine. It was the master's duty to place his vessel upon the slip, and to cause her repairs to be begun at the earliest possible moment. How could he, or any other master in his position, foretell the exact amount of expense which such repairs would entail? Or if, by survey, he could have ascertained a probable estimate of the gross expense, it could only have been a probable estimate, and many items of expense must always be incurred which such an estimate cannot cover.

The case of *Beldon v. Campbell* (4) was much relied upon by the defendants in this case, but I am unable to perceive the application of the point decided in it to the facts of this case, inasmuch as it only decided that where the ship had arrived at her port of destination, and the owner was residing within a distance where he might be easily communicated with, the master ought to have communicated with him before he borrowed money to pay workmen employed on the ship. The facts of the case before me are materially, indeed wholly, different. But the judgment contains a perspicuous statement of the master's authority, which I will quote:—"The master (said Baron Parke, at p. 889) is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has, as incident to that employment, a right to bind his owner for all that is necessary; that is,—upon the legal maxim,—‘quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.’ Consequently the master has perfect authority to bind his principal, the owner, as to all the repairs necessary for the purpose of bringing the ship to its port of destination; and

(1) 1 Dodson, at p. 287.

(2) 1 Wm. Rob. at p. 8.

(3) Lush. 45.

(4) 6 Exch. 886.

he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, that is to say, where certain payments must be made in the course of the voyage, and for which ready money is required. An instance of this is the payment of port dues, which are required to be paid in cash, or lights or any other dues which require immediate cash payments. So also in the case referred to in the course of the argument, where a ship being at the termination of one voyage and about to proceed on another, money borrowed to pay the wages of seamen who would not go on the second voyage without being paid was considered necessary: *Robinson v. Lyall*. (1) But these instances do not apply where the owner of the vessel is living so near the spot as to be conveniently communicated with. In that case, before the master has any right to make the owner a debtor to a third person, he must consult him, and see whether he is willing to be made a debtor, or whether he will refuse to pay the money."

The case of the *Hebe* (2), it is admitted, is a direct authority in favour of the proposition that a bottomry bond for the purpose of obtaining money for the payment of debts for necessities previously incurred on personal credit, may be legally given to a person who has not supplied such necessities. It has been attempted, but I think unsuccessfully, to impugn the authority of that case. I have examined it minutely: it has been very carefully reported, both in the Notes of Cases, vol. iv. p. 361 (A.D. 1846), and in the 10th volume of the Jurist, p. 227; and it is not unimportant to observe that the following cases were cited in argument: the *Augusta* (3); the *Zodiac* (4); the *Hersey* (5); the *Vibilia* (6); the *Lochiel*. (7)

The case appears to have been well argued and deliberately decided in the year 1846; and it derives confirmation from the decision of the same learned judge who, in the case of the *North Star* (8), in the year 1860, said:—Can a right of personal action only be the foundation of a bottomry bond? The general rule is that

(1) 7 Price, 592.

(2) 2 Wm. Rob. 146.

(3) 1 Dodson, 283.

(4) 1 Hagg. 320.

(5) 3 Moo. P. C. 79.

(6) 1 Wm. Rob. 1.

(7) 2 Wm. Rob. 34.

(8) Lush. at p. 50.

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they cannot, except preceded by the promise of a bond; but we must bear in mind the distinctions applicable to such cases. A master entering a foreign port in need of necessaries, from distress or otherwise, may incur debts for repairs or necessaries. Those debts may be purely personal; but he may borrow money on bottomry from any one not his creditor to pay such debts. On the other hand, the *Augusta* (1) has settled that a personal debt cannot be converted into a bottomry transaction."

The high authority of Mr. Justice Story, as will presently be seen, appears to be in favour of the doctrine contained in the *Hebe* (2) and the *North Star*. (3)

I should observe that I have considered the case of the *Hersey* (4), referred to in the *Ariadne* (5); and looking to the facts of the *Hersey*, I am of opinion that it in no way interferes with the decision in the *Hebe*.

The *Hersey* was cited, I observe, in the argument which preceded the judgment in the *Hebe*.

I must now draw attention to another fact proved in this case, and having an important bearing upon the law which must decide it. It is in evidence that, by the law in Bermuda, those who supplied the necessaries had a lien upon this ship, and could have arrested her.

In 1838 Dr. Lushington decided the case of the *Vibilia*, and in the course of his judgment he said (6):—"With regard to the further objection that has been urged in the argument, that it was not until after the responsibility had been incurred by Mr. Baldwin that a bottomry bond was agreed upon, I am of opinion that such objection has been disposed of by the judgment of Lord Stowell in the case of the *Alexander*. He says: 'The question is whether so induced they (the consignees) did not make these advances on the credit of the ship? Against the proprietors of the cargo they had no direct demand for repairs done to the ship, and as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself as their security. Some of the advances were made before the master was appointed, and these it

(1) 1 Dodson, 283.  
(2) 2 Wm. Rob. 146.  
(3) Lush. 45.

(4) 3 Moo. P. C. 79.  
(5) 1 Wm. Rob. 411.  
(6) 1 Wm. Rob. at p. 12.



is said could have had no reference to a bond of hypothecation. But what could they look to but the ship? For of the owners of the ship they had no knowledge: the bond was not perhaps noticed at first; because in Pernambuco, as in other foreign states, there is no necessity for an instrument of this kind, for by the general maritime law the ship itself is ipso facto liable for repairs. There was no necessity, therefore, for having recourse to a bond till the ship was coming to this country, where, from peculiar motives of policy, a special hypothecation is required.' 1868  
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"It is evident, therefore, that in the opinion of Lord Stowell, it is competent for the foreign merchant, without any express agreement for a bottomry bond, to make advances on the security of the ship, that is, upon the faith of a lien given by the law of his own country, and it is not necessary for him to have a bond of bottomry, or an agreement for such a bond, until the ship is about to sail. This is the real substance of the case of the *Alexander*, and constitutes the important distinction between the cases of the *Alexander* and the *Augusta*, which applies only to the conversion of an advance on personal security into a bottomry transaction."

In the case of the *Prince George* (1), it is said:—"If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship, this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties."

It has been said that this passage contains a mere dictum, that it has not been acted upon, and has indeed been discountenanced by the subsequent judgment of Dr. Lushington in the *Osmanli*. (2)

It is true that in his judgment in that case, the learned judge seems at that time to have supposed that the passage in the *Prince George* was uttered per incuriam, and without sufficient attention to Lord Stowell's judgment in the *Augusta*. That case was, however, cited by counsel in the case of the *Prince George*, the judg-

(1) 4 Moo. P. C. at p. 25.

(2) 3 Wm. Rob. 198.

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ment in which was delivered by Lord Campbell (the other members of the Judicial Committee being Lord Wynford, Lord Brougham, and Mr. Justice Erskine); and I must consider the decision of the *Prince George* (1) to be binding upon the Court. I observe that in a later judgment, delivered in 1861, in the case of the *Edmond* (2), in which the *Prince George* (1) had been cited for another point, and it had been replied that the *Osmanli* (3) and the *North Star* (4), and subsequent decisions of the Admiralty Court, were at variance with the *Prince George* (1), Dr. Lushington denied the variance, but he also said :—"Cases decided by myself have been cited which it has been argued conflict with this doctrine. The answer, if that is so, is short and conclusive. I must obey the Judicial Committee, and not adhere to what must, if different from their doctrine, be considered my own errors."

The *Hebe* was decided in 1846, four years after the *Prince George*, in 1842. Dr. Lushington glanced at this liability to detention (5) in a way which indicates that he then inclined to the opinion that such liability would warrant a bottomry bond. The same inclination of opinion is to be discovered in the *North Star* (4), and in the *Laurel* (6), this inclination seems to have become much stronger and more decided, and more at variance with the *Osmanli* (3). In the *Laurel* (6) the learned judge says (7) :—

"Now the Court, from the case of the *Augusta* to the cases up to the present day, has good reason to conclude that in almost all foreign countries, if not in all, merchants who supply money to defray the necessary expenses of the ship, tradesmen who do the necessary repairs or furnish the necessary articles, have a right of arresting the ship to satisfy their demands, if such right of arrest, per se, renders valid any bottomry bond, though there was no agreement or understanding that such bond would be required, it follows that under such circumstances, in all cases a bond, and a valid bond, may be executed, though the master never made any such agreement, never contemplated the granting a bottomry bond, and if he had suspected a bond would have been required,

(1) 4 Moo. P. C. 21.

(2) Lush. at p. 220.

(3) 3 Wm. Rob. 198.

(4) Lush. 45.

(5) 4 N. of C. at p. 368.

(6) Brow. & Lush. 191.

(7) Brow. & Lush. at p. 196.

might have hesitated before he received such assistance; might have sought for it in other quarters, or in some cases have waited for instructions from owners or consignees. These are very serious considerations, which would make the Court pause before it gave its assent to such doctrine; still it may be that such state of the *lex loci*, though not perhaps sufficient to bring about all those consequences attributed to it, may be an important ingredient assisting to support the validity of the bond.”

And the learned judge continues (1):—“I think that the effect of the observations is, that such *lex* is important as regards the intention to advance on the credit of the ship, but not conclusive that the *lex loci* alone would render a bond, otherwise void, valid.”

For the purpose of this case it would, I think, be sufficient to accept this modified opinion of Dr. Lushington. But I must repeat that I consider the opinion expressed in the *Prince George* (2) as binding upon this Court.

It is observable that in the *Hersey* (3) (1840) the Privy Council, confirming a judgment which set aside a bottomry bond, dwelt upon the circumstances that the vessel in that case could not have been detained. As these questions of bottomry bonds belong, like other questions of commercial law, to the *jus gentium*, it is satisfactory to be able to cite the authority of Story, both upon the point of the lawfulness of a bond given to a person advancing money to pay off debts already contracted for the supply of necessities to the ship, and on the point of the liability of the ship to arrest warranting a bottomry bond to redeem her from that peril.

“It is undoubtedly true that material men and others who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the Admiralty Court to enforce that right; and it must be admitted that in such a case a *bonâ fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for

(1) Brow. & Lush. at p. 197.

(2) 4 Moo. P. C. 21.

(3) 3 Hagg. Adm. 404.

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I think it will be found upon examination of the foreign maritime law that the bottomry bond, under the various titles of *contrat à la grosse aventure*, *hypotheca*, *bodmer*, or *cambio maritimo*, was always considered as binding the cargo, and that the necessity of a special communication, if possible, of the master with the owner of the cargo, according to the doctrine of recent cases, however just in principle, is peculiar to the English law.

Bynkershoeck, in the sixteenth chapter of the third book of his *Quæstiones Juris Privati* "de Contractu qui dicitur Bodemery," observes, that the law as to this contract did not attain maturity till after the age of Grotius, and was very gradually built up, and can be very scantily explained by reference to the Roman law, *De nautico fœnore*, from which it was derived. He sets aside the definition of bottomry given by Grotius as imperfect in many respects. He gives this definition: "*Contractus quo pecunia creditur magistris navium in exteris regionibus, sive dominis navium et mercium in his regionibus, ea lege, ut si navis pereat, creditor jus crediti amittat, si salva advenerit in locum destinatum, restituatur cum usuris nauticis, vel majoribus vel minoribus ut pro ratione periculi inter creditorem et debitorem convenit;*" and

(1) 1 Wheaton, at pp. 104-5.



then he continues: "Ipse non addidi naves, instrumenta navium, merces, et quicquid ex his saluum advenerit, pignori dari, quia ut formulis id sæpe inseritur, sæpe etiam in his omittitur, et quamvis omittatur pro inserto habendum ex natura hujus mutui." Again he says: "Neque enim bodemery mera sponsio est, dabo tot, si navis tota salva et indemnis appulerit ibi, sed contractus fœnerati-tius, quo tota navis et partes, et si hoc actum est etiam onus, pro pecuniâ erogatâ pignori ponitur. Hæc omnia obligavit magister et obligare potuit."

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I have hitherto considered the validity of this hypothecation in relation to the ship and freight, the defendants, the owners of the cargo, having, as it was quite competent for them to do, denied, even in this relation, the validity of the bond.

But they have more especially contended against the validity of it with respect to the cargo, maintaining that the bond may be valid as it affects the ship and freight, and yet invalid as it affects the cargo.

In the recent case of the *Lizzie* (1), I stated at length my view of the law which has been laid down with respect to the duty of the master to communicate with the owner of the cargo before he hypothecates it. That duty arises from the peculiar character of his relation as agent for the shipper, a relation forced upon him for the nonce by a temporary necessity, and therefore different from his original and abiding relation as agent for the owner of the ship.

It must be observed, however, that the law does not say that the necessity of communicating with the owner of the cargo is different in kind from the necessity of communicating with the owner of the ship; but that there must be a separate communication, if in the circumstances it be feasible, with both.

Referring to my judgment in *The Lizzie* (1), it is only necessary to state here that it is, generally speaking, the duty of the master to communicate, or to attempt to communicate, with the owner of the cargo. The law looks with jealousy upon the exercise of authority by the master over the cargo.

It has been ruled that a master cannot, according to the law—which is perhaps not in harmony with the general maritime law on the point—legally give a bond on cargo alone, or on ship and

(1) Ante, p. 254.

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cargo without freight, or if he does so the ship and freight must be exhausted before recourse can be had to the cargo; but, on the other hand, I believe that the usual form of bond is upon ship, freight, and cargo, and that according to the general maritime law the cargo is included in the bottomry bond.

I am fortified in this opinion by the statement of a learned modern writer upon the subject, who says: "Notio amplius patens maximeque usitata vocis bodmeriæ etiam ista negotia commercii maritimi complectitur, in quibus ad tuendum jus creditoris debitor non solum navem cum vecturâ sed etiam onus navis, sive navem vel vecturam solam vel onus solum pignori obligat, eâ semper conditione additâ, ne pecunia cum usuris constitutis reddatur antequam res oppigneratæ salvæ perveniant in portum constitutum." (1)

Lord Stowell, speaking of the master's authority with respect to the cargo, observes:—"It is the same consideration which founds the rule of law, that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument, that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship, is in no degree and under no circumstances done for the benefit, or with a prospect of a benefit, to the cargo; whereas the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo." *The Gratitude.* (2)

The rule has been now so well determined that the difficulty consists in the application of the rule to the circumstances of the particular case, and not in the ascertainment of the rule which is to be so applied.

In the present case, the facts appear to me to establish the following propositions:—First, That the master acted with perfect good faith throughout the whole of this transaction; secondly, that he did make an attempt to communicate with the owners of

(1) Franck, *De Bodmeria*, p. 1.

(2) 3 C. Rob. at p. 261.

the cargo, which brings him within the principle of the cases decided by the Privy Council, to which I have adverted in my judgment in the case of the *Lizzie* (1); thirdly, that having failed in this attempt, he acted on behalf of the cargo, as a prudent man, having in view the benefit of the proprietor, ought to have acted.

There is only one remaining question for the consideration of the Court. The defendants have, as I have already observed, retained the sum of 727*l.* 19*s.* 2*d.* in their hands due from the freight for the following reasons, set out in their answer:—

“That if no deduction had to be made from the freight originally stipulated in the charterparty, the said freight would amount to 1,324*l.* 16*s.*

“That after the making of the charterparty in the 7th article of the petition mentioned, and whilst the *Karnak* was lying at Galveston, and before she departed on her chartered voyage, the defendants from time to time advanced to the said master, on account of necessary disbursements, certain moneys amounting in the whole to 632*l.* 14*s.* 2*d.*, and at the respective times of the making of the said advances as aforesaid, it was agreed between the said charterers and the said master as follows (that is to say):—That the said advances should be made and taken pro tanto in part payment of freight; and the owners of the said vessel should in no case whatsoever be liable to refund to the said charterers the said advances; and, further, that the costs of the insurances to be effected by the said charterers, as well as interest at the rate of 10*l.* per centum per annum on the said advances, should be also deducted from and taken pro tanto in part payment of freight.

“That after the greater part of the said advances (to wit) advances amounting to the sum of 596*l.* 12*s.* 6*d.* had been made to him, the said master endorsed on the said charterparty a receipt, of which the following is a copy:—

“Received from Messrs. Droege & Co., of here, the sum of 596*l.* 12*s.* 6*d.* pounds sterling, which I promise to pay at Liverpool to Messrs. Droege & Co., of Manchester, or their order, out of the proceeds of present freight, with the addition of 10*l.* per centum per annum, and charges for insurance for the above-named sum.

(Signed) “Geo. S. Locke.”

(1) Ante, p. 254.

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To this receipt must be added the following document produced by the defendants under an order for discovery issued by this Court:—

“Receipt for the balance of the loan by Droege & Co., to the master of the *Karnak* at Galveston, not included in the receipt endorsed on the charter.

“Received, Galveston, December 13th, 1866, of Messrs. Droege & Co., the amount of thirty-six pounds one  $\frac{8}{12}$  shillings British sterling, besides the amount of five hundred and ninety-six pounds  $\frac{6}{12}$  shillings sterling entered on this charterparty, thus making the total loan of Droege & Co. to me the amount of six hundred thirty-two pounds fourteen  $\frac{2}{12}$  shillings British sterling, which with 10 per cent. per annum interests from date, and the premium of insurance, I promise to pay to the order of Messrs. Droege & Co., on my arrival at Liverpool, out of the proceeds of my present freight. 596*l.* 12*s.* 6*d.*, entered on charterparty. 36*l.* 1*s.* 8*d.*, paid to me to-day.—Geo. S. Locke.”

The question is whether this money so advanced was a loan, as the plaintiffs contend, or an advance of freight, as the defendants maintain. In the former case the money, as representing the rest of the freight, must be paid into court, as being liable to contribute to the payment of the bondholder. In the latter case the defendants will be entitled to retain this sum of money, inasmuch as they have already paid that portion of the freight which it represents. And this question must be solved by the answer to another question, What did the freight consist of at the time when the bottomry bond was granted? It is not necessary to consider whether the master, having regard to the charterparty, which provided that the freight should be paid at Liverpool, did not act *ultra vires* as agent for the owner in receiving freight in advance.

The legal distinction between a loan and an advance of freight is clearly stated by Dr. Lushington in the *Salacia*. (1)

“An advance of freight,” he says, “is an insurable interest, because the liability of the shipowner to repay it is dependent upon the same contingencies as the shipowner’s claim to freight itself. A loan, on the other hand, is not freight, is not an insurable interest; for whatever happens to the ship, the loan may be re-

(1) Lush. at p. 582.



covered by action against the shipowner. The difference is well shewn in *Manfield v. Mailland*. (1) That was an action against underwriters for an advance which had been insured, and it appeared that the charterparty authorized an advance to be made, but was silent as to whether it should be allowed as a deduction on settlement of freight. In consequence of the absence of the latter provision, the Court held that the advance was not an insurable interest." 1868  
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The case of *Hicks v. Shield* (2) is an authority for shewing that the question whether the advance be a mere loan or an advance of freight must principally depend upon what appears upon the face of the instrument.

There is some discrepancy in the evidence of the master and Bluck upon this matter, but, looking to the circular issued by the master, and more especially to the language of the receipt, I am of opinion that this advance of money must be legally considered as a loan, and not as an advance of freight. I think the freight existed at the time the bottomry bond was given, and must be considered as being duly bound by that instrument.

I pronounce for the validity of this bond so far as it affects the cargo, and I direct the defendants to pay into Court the sum of 727*l.* 19*s.* 3*d.*, now retained by them in part satisfaction of the claim under the bond.

I condemn the defendants and their bail in the sum which remains due in respect of the bond, with 4 per cent. interest from the time when it ought to have been paid, and in the costs of this suit.

Attorneys for plaintiffs: *Waltons & Bubb*.

Attorneys for defendant: *Field, Roscoe, & Co.*

(1) 4 B. & Ald. 582.

(2) 7 E. & B. 633. *3 Jan 45. 715.*

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## THE LEADER.

June 27.

*Garnishee Order—Attorney's Lien for Costs*—23 & 24 Vict. c. 127, ss. 28, 29, 30.

The plaintiff having obtained a decree for payment by the defendant of a sum of money and costs, the defendant paid part of the sum to certain judgment creditors of the plaintiff under the authority of two garnishee orders. The plaintiff's attorneys had a lien for their costs at the time the garnishee orders were made; but no notice had been given to them previous to the application for the garnishee orders, nor was the existence of their lien mentioned to the judge who made the order:—

*Held*, that the defendant ought to have caused notice to be given to the attorneys, or ought to have apprised the judge of the existence of the lien before the orders were finally made, and that the payment under the garnishee orders was not a satisfaction of the judgment of the Court.

SUIT instituted by the late master of the *Leader* to recover his wages and disbursements. The cause was referred to the registrar and merchants, who reported that the sum of 49*l.* 2*s.* 7*d.*, with interest, was due to the plaintiff, and his costs. On the 21st of January, 1868, the Court confirmed the registrar's report, but directed that an abatement of 5*l.* should be made from the plaintiff's taxed costs, and that the sum of 25*l.* 13*s.* 4*d.*, which had been tendered by the defendant, should be paid out to the plaintiff in part satisfaction of his claim and costs, and condemned the defendant and his bail in the balance of the amount and costs. On the 12th of March, the plaintiff's attorney filed a bill of costs taxed at the sum of 70*l.* 16*s.* 2*d.*, from which 5*l.* was deducted by the order of the Court, leaving a balance of 65*l.* 16*s.* 2*d.* On the 22nd of May, the plaintiff's attorney filed an affidavit in support of a monition which was prayed against the defendant for payment of the 65*l.* 16*s.* 2*d.* The affidavit set out that frequent applications had been made to the defendant's solicitor for the sum of 65*l.* 16*s.* 2*d.*, being the taxed costs, and for the balance of the plaintiff's claim, amounting to 23*l.* 9*s.* 3*d.*, being the balance of the sum awarded by the registrar to the plaintiff, after the payment of the 25*l.* 13*s.* 4*d.* in Court; that these applications had been without effect, but that on the 12th of March the defendant's solicitor wrote a letter, stating that under two garnishee orders he had paid the respective sums of 32*l.* and 40*l.* 12*s.* 8*d.* (72*l.* 12*s.* 8*d.*),

and that he enclosed him a cheque for 17*l.* 4*s.* 7*d.*, which was all that remained after making these deductions and those already mentioned. The plaintiff's attorney complained that this was the first intimation he had received of the existence of any such garnishee orders, that payment had been made without any communication with his firm, that they were no bar to his lien for the costs, which lien had never been mentioned to the judge who made the order. The attorneys for the defendant were also the attorneys for the creditors of the plaintiff, and obtained the garnishee orders.

The case now came before the Court on motion by the plaintiff's attorneys for a monition against the bail to enforce payment of the balance due to them. (1)

June 9. *Clarkson*, in support of the motion. The attorneys for the defendant, when applying for the garnishee orders, ought to have brought to the notice of the judge the existence of the plaintiff's attorney's lien. They were perfectly aware of all the facts, for they were not only attorneys for the judgment creditors, but had also instructed the defendant's proctor in this case. The *Olive* (2) was decided in 1859 before the passing of the Act of 1860, which provides a special machinery applicable to these cases. A gar-

(1) The following section of the Attorneys and Solicitors Act is material to the case :—

23 & 24 Vict. c. 127, s. 28 :—"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed

costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property, as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations."

(2) Swab. 423. *5 June MS. 445*

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nishee order does not affect a solicitor's lien unless that lien be barred. The defendant remains still liable to pay this claim of the plaintiff's attorneys: *Bozon v. Bolland* (1); *Sympson v. Prothero*. (2)

*Butt*, *contrà*. The *Olive* distinctly lays down that this Court will not review the order of a judge. The broad question here is, is the defendant to pay twice over? He has already paid the whole of the debt and costs. The garnishee order clearly bars the plaintiff's own claim: the debt is due to the plaintiff, not to the plaintiff's attorney. The defendant's attorneys certainly took advantage of the knowledge they possessed from their peculiar position, as acting both for the defendant and for the judgment creditors of the plaintiff, but in doing so they only did their duty. The cases of *Hough v. Edwards* (3), *Barker v. St. Quintin* (4), are authorities to shew that the plaintiff's attorneys had neither a lien nor a charge when the garnishee orders were taken out. The 28th section of the 23 & 24 Vict. c. 127, recognizes the authority of these cases: it acknowledges no lien, but permits an application to the Court. Had the plaintiff's attorneys made an application to this Court, it might have been different. There is no authority in any court for making a garnishee pay twice over.

*Clarkson* replied.

*Cur. adv. vult.*

June 27. SIR ROBERT PHILLIMORE [after stating the facts as above]:—The propositions which appear to be maintained on behalf of the defendant are, first, that the plaintiff's attorneys had no lien on this sum of money when the garnishee orders were taken out; secondly, that the garnishee was not bound to apprise the judge of the existence of any lien, if there were one; thirdly, that the plaintiff's attorneys acquired a further right, in addition to their ordinary lien, under the provisions of the 28th section of 23 & 24 Vict. c. 127, which relates to the powers of courts of justice to declare the solicitor entitled to a charge on the property recovered through his instrumentality for taxed costs in the suit in which it was recovered. It was further contended

(1) 4 My. & Cr. 354.

(2) 26 L. J. (Ch.) 671..

(3) 26 L. J. (Ex.) 54.

(4) 12 M. & W. 441.

*2 June 28/72*



that the defendant could not be made to pay twice over, and the case of the *Olive* (1) was relied upon to shew that this Court would consider a garnishee order as binding upon it. In that case the defendant had been condemned in costs; but before the proctor for the plaintiff had obtained payment of his entire bill of costs, the money was attached by a garnishee order in the hands of the defendant. The judge held that a payment under that order was a satisfaction of the judgment in this Court as against the proctor's lien. Two circumstances are to be observed, however, in that case which distinguish it from the suit now before me. First: That the order was not finally made by the judge at common law until it had been served upon the proctor, who had full notice to appear and shew cause against the order, but did not choose to do so. Secondly: That the case was decided in 1859—previously, therefore, to the passing, in 1860, of 23 & 24 Vict. c. 127.

In the present case the defendant has not thought proper either to serve the plaintiff's solicitor, as was done in the *Olive*, with a notice of the order, or to avail himself of the protection of the statute 23 & 24 Vict. c. 127, ss. 29, 30, which seem to have been framed for the express purpose of enabling the garnishee to protect himself from the lien of a third person.

It has been further contended, on the authority of *Barker v. St. Quintin* (2), that the solicitor had no lien for his costs at the time the garnishee order was made. I have considered that case, and also the case of *Sympson v. Prothero*. (3)

In the former case Baron Parke observed at p. 451, "The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt. The doctrine of an attorney's lien on a judgment was first established in the case of *Welsh v. Hole* (4), where it was held that an attorney has a lien on money of his client in his hands, and that he may retain the amount of his bill; and that if the plaintiff gave notice to the defendant not to pay the money to the attorney, the Court would probably assist him by compelling the defendant to pay the money over again."

(1) Swab. 423. *5/12* *25445*

(2) 12 M. & W. 441.

(3) 26 L. J. (Ch.) 671. *3/12* *45712*

(4) 1 Doug. 237.

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In the latter case, namely, *Sympson v. Prothero* (1), Vice-Chancellor Wood observed: "I think that this money, having been recovered by the exertions of the plaintiffs, they are entitled to a lien upon it for their costs; and I do not see how the subsequent charging order can affect that lien. Some question might have arisen if no notice of the lien had been served upon the Protheros; but, certainly, notice of the lien was served upon their solicitors in January, and the order was not obtained till February, and this is an answer to any argument as to the want of due diligence on their part. The only question remaining, therefore, is to what extent the lien is good, and what amount of costs the plaintiffs are entitled to receive. The principle upon which, I apprehend, the Court should proceed in these transactions is to consider how the fund has been obtained; and if you find that it has been recovered by the exertions of the party claiming the lien, it is but right that he should have his reward out of the fruits of his exertions."

I am of opinion that the plaintiff's attorneys in this case had a lien for their costs at the time when the garnishee orders were made; and that the defendant ought to have caused notice to have been given to the attorneys, or ought to have apprised the judge of the existence of this lien before the orders were finally made. I do not consider that, in the circumstances of this case, the payment under the garnishee orders is a valid satisfaction of the judgment of this Court, and I must order a monition to go against the bail to pay the amount of the taxed costs of the plaintiff's attorneys, together with the costs of, and incident to, this motion and the monition.

Attorneys for plaintiff: *Cotterill & Sons.*

Proctor for defendant: *Coote.*

(1) 26 L. J. (Ch.) at p. 672, *3 Jan 65/12*

## THE MARY OR ALEXANDRA.

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June 27.

*Interrogatories—Practice—Cause of Possession.*

The Court of Admiralty will allow interrogatories to be administered rather in accordance with the practice of the Courts of Equity than of Common Law; and the principle by which the Court will be governed is, that the interrogatories should be such as tend bona fide to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the Court has to decide.

On objection by the defendant to interrogatories tendered by the plaintiffs in a cause of possession, that his answers to them might subject him to penalties under the Foreign Enlistment Act:—

*Held*, that the interrogatories should be administered, but that if the defendant stated upon his oath his belief that an answer to any particular interrogatory would subject him to such penalties, he should not be compelled to answer it.

CAUSE of possession instituted by the United States Government against Charles Kuhn Prioleau, the alleged sole owner of the *Mary* or *Alexandra*. The plaintiffs alleged that the vessel had been vested in the Confederate States, to whose rights the plaintiffs had succeeded, and that the plaintiffs were entitled to the vessel. The cause came before the Court on motion by the defendant to reject interrogatories tendered by the plaintiffs, on the ground that they were superfluous, or as referring to matters of which the defendant had no knowledge, but principally on the ground that some of them, if answered affirmatively, might subject the defendant to the penalties of the Foreign Enlistment Act.

June 11 and 16. *Milward, Q.C.*, and *Butt*, in support of the motion, argued that it was not right to put the defendant in a position either to answer questions tending to criminate him, or which he must refuse to answer, and thereby prejudice his case; that the bulk of the interrogatories being objectionable, all should be rejected.

*Sir W. B. Brett, Q.C. (S.G.)*, *The Queen's Advocate*, and *Clarkson*, for the plaintiffs. The first question is as to the mode of dealing with interrogatories in this court. It has been said that the only power the Court has is that given by s. 17 of the Admiralty Court Act, 1861; but this court is also a court of equity, and before the passing of that statute there was another mode of obtaining the

*See p. 150*

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same advantages as those given by administering interrogatories, viz., by compelling personal answers. The Admiralty Court Act gives no new power, but only the same power to be exercised in a different way.

The power of administering interrogatories at common law is exercised in accordance with Common Law practice. The Court of Chancery compels discovery according to Chancery practice. This court must also be governed by its own mode of procedure in allowing interrogatories to be administered which will be in correspondence with the practice of the Court of Chancery. If a witness may be asked *vivâ voce* a question, the answer to which might criminate him, why should he not be asked the same by interrogatories?

There is no criminal proceeding maintainable under the Foreign Enlistment Act; a penalty alone may be inflicted, and its provisions cannot apply to the defendant, who is not a natural-born subject, but only a naturalized foreigner. There can be no forfeiture of the ship, inasmuch as the period specified by the act, beyond which a forfeiture cannot take place, has elapsed.

*Butt* replied.

In the course of the arguments, the following cases were referred to and discussed: *Croomes v. Morrison* (1); *Osborn v. London Dock Company* (2); *Tupling v. Ward* (3); *Robson v. Crawley and Cooke* (4); *Bartlett v. Lewis* (5); *Baker v. Lane* (6); *Bickford v. Darcy and Beachey* (7); *Stern v. Sevastopulo*. (8)

*Cur. adv. vult.*

June 27. SIR ROBERT PHILLIMORE. This is an application to the Court to permit certain interrogatories to be administered to the defendant in this case.

The principles which ought to guide the Court, and regulate the practice of it, with respect to this mode of discovering the truth in contested cases, has been discussed at much length upon

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|------------------------------------------------------------|--------------------------------------------------------------------|
| (1) 5 E. & B. 984.                                         | (5) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.                      |
| (2) 10 Ex. 698. <i>11 Jun MS 93.</i>                       | (6) 3 H. & C. 544; 34 L. J. (Ex.) 57. <i>11 Jun MS 202</i>         |
| (3) 6 H. & N. 749; 30 L. J. (Ex.) 222. <i>7 Jun MS 314</i> | (7) Law Rep. 1 Ex. 354. <i>12 Jun MS 116</i>                       |
| (4) 2 H. & N. 766; 27 L. J. (Ex.) 151. <i>4 Jun MS 75.</i> | (8) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268. <i>10 Jun MS 317</i> |



this occasion; and a variety of authorities, principally derived from the decisions of the Common Law courts, have been cited.

I think it expedient to say something both with respect to the ancient practice of this court and the powers conferred upon it by the recent statute.

According to the ancient practice of the Court it would be competent to the plaintiff to counterplead the averments contained in the plea of the defendant, either absolutely, or by giving a different version of the facts to which they relate, and to have required his answer upon oath to these contradictory or explanatory averments in the counter-plea; and in this way a great if not the greater part of the interrogatories before me might practically have been administered, subject always to legitimate objection on the part of the defendant, that his answers were called for upon matters irrelevant, or of which he was ignorant, or which would expose him to pains or penalties, by compelling him to criminate himself. In fact, the practice of the Court of Admiralty has always, to a certain extent, been that of a court of equity as well as of a court of law.

With regard to more modern practice, the 17th section of 24 Vict. c. 10 (the Admiralty Court Jurisdiction Act), enacts as follows: "The Judge of the High Court of Admiralty shall have all such powers as are possessed by any of the superior Courts of Common Law or any judge thereof, to compel either party in any cause or matter to answer interrogatories, and to enforce the production, inspection, and delivery of copies of any documents in his possession or power." The powers possessed by the superior Courts of Common Law are derived from s. 51 of 17 & 18 Vict. c. 125.

I have been referred to a variety of decisions by the Common Law Courts upon the question of incorporating into their practice the use of these interrogatories.

I regret to say that I have not derived much assistance, still less any clear rule for my guidance from a perusal of these decisions. They are very conflicting, and seem to shew that two schools of thought or opinion with respect to the use of these interrogatories, especially as to those which are said to be of a criminatory character, exist in Westminster Hall. I find, however, that the Common Pleas, under the presidency of Erle, C.J.,

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came to the conclusion that the practice of the Court of Chancery in this matter was not to be considered as binding upon the Courts of Common Law: *Bartlett v. Lewis*. (1)

I have considered the practice of the Court of Chancery upon the subject, as set forth in the 9th chapter of Daniell's Practice on "Interrogatories for the Examination of the Defendants in answer to the Bill," vol. i. 438—445 (4th ed.), and in the 14th chapter, s. 2, "On the Different Grounds of Demurrer to a Bill of Discovery," vol. i. 503—536 (4th ed.); and I have come to the conclusion that the interests of justice require me to mould, as far as I am able, the practice of this Court, rather in conformity with the practice of the Courts of Equity than of Common Law.

The cardinal principle by which I intend to be governed in this matter, is, that the interrogatories ought to be such as tend bonâ fide to support the case of the plaintiff, and to favour a complete inquiry into the truth of the issue which the Court has to decide.

The limitation to this principle which is derived from their tendency to criminate the answerer, I will presently consider.

In order to apply the principle to the present interrogatories, I must consider the scheme, so to speak, of the petition and the answer.

The petitioners being the United States of America, claim, in a cause of possession, this vessel, the *Alexandra* or *Mary*, on the ground that she was built, purchased, or acquired by a pretended rebel Government in whose de facto possession she was at the time when the rebellion was suppressed, though de jure she belonged to the United States, that she never was, and is not the property of Mr. Prioleau, in whose possession she is.

Now the defendant Prioleau does not in his answer, state simply, "I say I am the registered owner, and here is my register," but he sets up a history by which his title to the vessel is to be established, as it were, by a chain of evidence consisting of various specified links, and relying upon documents which the petitioners contend are tainted with mala fides, and fraudulent, and they allege that the object of these interrogatories is to prove not only that the title of the defendant is bad, but that in truth the various owners through whom his title is derived, as well as the defendant himself, will appear, when the fraud is unravelled by means of these interroga-

tories, to have been, by intendment of law necessary agents or trustees for the plaintiffs. For instance, the answer states that the ship was built by one Miller, of Liverpool, for the firm of Fawcett, Preston, & Co.,—by them transferred to one Henry Lafone; by him to Priolean, the present defendant; and documents of transfer and conveyance are referred to. These interrogatories, it is alleged, will elicit the facts not only that these transfers are simulated, and the documents colourable, but they will also shew that the true owner was the rebel government: and on that account the mere holder of property for the benefit of the present plaintiffs—the United States. Therefore, it is argued, these interrogatories have a bonâ fide tendency, not merely to negative and destroy the title of the defendant, but to affirm and render evident the title of the plaintiffs.

Looking to all the circumstances of the case, I have come to the opinion that this argument is sound, and that, adhering to the principle which I have enunciated, the interrogatories, speaking generally, ought to be allowed.

It has been contended that some of the interrogatories are objectionable, either as being superfluous, or as referring to matter of which the defendant is ignorant; or as leading to answers which would criminate him.

With respect to the first of these objections, I am not clear that the interrogatories are superfluous; and no injury can arise to the defendant from answering them; and this latter observation extends to the second head of objection; for, if the defendant be ignorant of the facts as to which he is interrogated, he can say so.

With respect to the third head, the objection is more serious. Many of the interrogatories, it is urged, tend to prove that the defendant was guilty of a breach of the Foreign Enlistment Act, and thereby to subject him to penalties.

The courts of equity appear to have holden that, as a general rule, a person was not compelled to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever might be the nature of that punishment: 1 Daniell's Chancery Practice (4th ed.), p. 516. This rule, however, was subject to considerable modification; and, in the courts of equity, underwriters, in cases where policies of insurance were

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found to have been effected with gross frauds, brought the parties into court, and compelled them to answer, by stating in their bills frauds which would have been indictable: 1 Daniell's Chancery Practice (4th ed.), pp. 518, 519, and *Darrie v. Verelst*, cited in *Macaulay v. Shackell*. (1)

In the Courts of Common Law the practice on this point has been conflicting and contradictory, and in the very last case decided, during the argument in this case, the Court of Exchequer was divided, or rather the judges were divided, a majority of three to two deciding that the witness was bound to answer questions though they had a tendency to criminate him: *M'Fadzen v. Liverpool Corporation*. (2)

It has been holden, however, both at equity and at law, that a defendant, in order to protect himself from answering, on the ground that the discovery of the matters inquired after would expose, or tend to expose, him to penalties, must state upon oath his belief that such would be the case; a submission of the question to the Court is not sufficient: *Fisher v. Ronalds* (3); *Scott v. Miller*. (4)

It is obvious that in certain cases, perhaps in the present, it may be much more for the advantage of the party desiring to put the interrogatory that the interrogated party should refuse to answer for this reason so sworn to than that the question should not be put at all. The tendency of some of these interrogatories to elicit an answer criminating the defendant is maintained on the ground that they would expose him to the penalties of the Foreign Enlistment Act.

It has been truly said that the provisions in that statute which affect natural-born subjects do not affect Mr. Prioleau, who is only a naturalized subject, nor do the provisions relate to the forfeiture of the ship, inasmuch as the prescribed period of twelve months, within which such forfeiture must accrue, has elapsed. The other provisions in the act which relate to a misdemeanour are indeed not limited to any period of time, and it is with respect to these only that the defendant can claim protection.

Upon the whole, I am of opinion that I ought to allow these

(1) 1 Bligh (N.S.) 130—133.

(2) Law Rep. 3 Ex. 279.

(3) 17 Jur. 393.

(4) Johnson, 328.

12CB 457-62  
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interrogatories to be administered, but that if the defendant states upon oath his belief that an answer to any particular interrogatory would subject him to the penalties of the Foreign Enlistment Act, he shall not be compelled to answer such interrogatory.

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Proctor for plaintiffs: *Rothery*.

Solicitors for defendant: *Gregory, Rowcliffes, & Co.*

### THE GULDFAXE.

Nov. 24.

*Jurisdiction of Admiralty Court—Lord Campbell's Act, 9 & 10 Vict. c. 93—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7—Damages for Personal Injury.*

In a suit to recover damages by the personal representative of a person killed in a collision between two vessels:—

*Held*, although not without doubt, that the Court had jurisdiction under Lord Campbell's Act, and the Admiralty Court Act, 1861, s. 7, to entertain the suit. X

CAUSE of damage on behalf of the administratrix of John Bawstead, deceased, who, at the time of his death, was one of the crew of the vessel *Four Brothers*, which was sunk by a collision with the *Guldfaxe*. The plaintiff alleged that the collision was caused by the mismanagement of the *Guldfaxe*. The defendants prayed the Court to reject the petition, on the ground that the Court had not jurisdiction to entertain the suit. The sections of the statutes material to the case are set out in the judgment.

Nov. 3 and 17. *Clarkson*, in support of the motion. Until the passing of Lord Campbell's Act (9 & 10 Vict. c. 93), there was no right of action for the recovery of damages in respect of an injury causing death. The Court then has to determine whether it has jurisdiction under the 7th section of the Admiralty Court Act, 1861. The language of the section shows that it was not intended to comprise a case of loss of life by collision in the phrase "damage done by a ship." In the Merchant Shipping Act, 1854, ss. 504, 506, 507, and the following sections, and the Merchant Shipping Act Amendment Act, 1862, s. 54, the legislature has drawn the distinction between a claim in respect of "damage" to property, and a claim in respect of "loss of life." The term "damage"

*But see contra Smith & Brown 6QB729*

5PC.447

32-8.290-

6QB.736

7CP.300

4A-8.419

PD.164-

166,173

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refers to an injury to property, and not to the case of an injury to the person resulting in loss of life. The language of Lord Campbell's Act throughout is inconsistent with the idea of the legislature having intended to confer the jurisdiction contended for. Besides, Lord Campbell's Act contemplates trial by jury, and this Court has no power to summon a jury.

*Butt* and *Pritchard*, contra. It is admitted, that before the passing of Lord Campbell's Act no action would have lain for the death of a seaman: the *Ruckers*. (1) Lord Campbell's Act, however, has not given a new remedy, but a new right, and the only difficulty is as to the mode of assessing damages, in consequence of the use of the word "jury" in the Act. This Court has, however, assessed damages: see the judgment in the *Sylph* (2); *Taylor v. Dewar*. (3) Assuming that the legal right exists, this Court will not be bound by the procedure under Lord Campbell's Act, but will work out the remedy in its own way.

*Cur. adv. vult.*

Nov. 24. SIR ROBERT PHILLIMORE. Though it has been suggested, and is possible, that this Court may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the Court, or from other sources, to warrant me in pronouncing in favour of the jurisdiction of the Court upon this ground. If the Court be competent to entertain this suit, it must have derived such competence from statute law.

The counsel for the plaintiff have mainly—I might almost say exclusively—relied upon certain recent statutes as having conferred this jurisdiction upon the Court. It becomes necessary, therefore, to examine these statutes.

In the year 1846, the statute 9 & 10 Vict. c. 93, commonly called "Lord Campbell's Act," entitled "An Act for compensating the families of persons killed by accidents," was passed. That statute recited that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and

(1) 4 C. Rob. 73.

(2) Law Rep. 2 A. & E. at p. 29.

(3) 5 B. & S. 53. 10 June 1853 361

expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him;" and it proceeds further to enact that, "whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

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The effect of this statute then was to give a new right previously unknown to the common law; according to which all suits founded on a personal injury or tort died with the person. The statute proceeds to specify the person for whom, and the manner in which the action shall be brought, and the remedy which shall be applied for the injury, as follows (s. 2) "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

This statute, though it effected the material alteration in the common law which I have mentioned, conferred no jurisdiction upon the Admiralty Court. The next statute I have to consider is the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 514), which enacted as follows:—"In cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in Eng-

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land or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner, and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

The Admiralty Court Act 1861 (24 Vict. c. 10, s. 13), conferred upon the High Court of Admiralty the same jurisdiction which the Court of Chancery possessed under the former statute. It is clear, therefore, that if in this very case of damage there had been several claimants, including the present plaintiff, and if the defendant had instituted a suit in this Court for the purpose of limiting the amount of his liability, and for the distribution of such amount rateably amongst the claimants, it would have been the duty of the Court to have entertained the suit. And it follows from this proposition, that the intervention of a jury would not be a necessary or the only means of enforcing the remedy against a wrong-doer under Lord Campbell's Act.

The Admiralty Court Act enacts by its 7th section, "that the High Court of Admiralty shall have jurisdiction over *any* claim for damage done by any ship."

Following the precedent set me by my learned predecessor, I have already ruled that the words of the section embrace the case of damage inflicted by a vessel upon other property than ships and upon persons: the *Sylph*. (1) It is true that Lord Campbell's Act contemplates only an action against the person; but then, the 35th section of the Admiralty Court Act enacts as follows:—"The jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings in rem, or by proceedings in

(1) Law Rep. 2 A. & E. 24.



personam;" and it was admitted by the counsel for the defendant, that the argument to be derived from the language of Lord Campbell's Act, was as strong against the jurisdiction of this Court in rem as in personam. In the much considered case of *Taylor v. Dewar* (1), I find the following passage:—"The vessel insured under this policy, the *Rouen*, having come into collision with, and run down another ship called the *Magyar*, and the master and five of the crew of the latter having been drowned, the owners of the *Rouen* have, by the judgment of the Court of Admiralty, been condemned to pay damages to the personal representatives of the deceased, and such damages have been paid accordingly." The jurisdiction of the Admiralty Court appears from the report of the argument to have undergone some discussion, but it seems to have been assumed that this Court did possess, and had rightfully exercised such jurisdiction.

I referred to this decision in the previous case of the *Sylph* (2); but I had not then caused any inquiry to be made into the history of the cause in the Admiralty Court. But since the institution of this suit I have caused such inquiry to be made; and the result is very remarkable. No trace can be found that, either the Court itself, or the registrar acting on behalf of the Court, came to any decision upon the question of payment of damages to the personal representatives of the deceased; or indeed, as far as I can find, entertained the question at all—perhaps it was an arrangement made out of Court; certainly, the declaration in *Taylor v. Dewar* (1) assumed the fact that the Court of Admiralty had decided on the case. This case, therefore, it is right to say, does not furnish the assistance to the Court, which the passage in the judgment, to which I have adverted, would at first sight appear to afford.

The question is by no means free from difficulty; but upon the whole, I have arrived at the conclusion that I ought to pronounce for the jurisdiction of this Court, and accordingly, though not without doubt and hesitation I do so; but I will give leave to the defendant to appeal from this decision, should such be his desire.

Proctors for plaintiff: *Pritchard & Sons.*

Proctor for defendants: *Toller.*

(1) 5 B. & S. at p. 64.

(2) Law Rep. 2 A. & E. 24.

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Nov. 19.

## THE CHARLES AMELIA.

*Damage—Sale of Vessel abroad—Subsequent arrest in England—Maritime Lien.*

A collision having occurred between a foreign vessel, the *C. A.*, and an English vessel the *R.*, the master of the *C. A.* admitting his liability, gave, in satisfaction of the damage, a bill of exchange, payable on the arrival of the *C. A.* at S., her port of destination in Scotland. The master of the *C. A.*, however, took her to France, where, her owner becoming bankrupt, she was sold by the assignees of his estate to the defendants, who brought her to England, where she was arrested by the owners of the *R.* in respect of the collision, the bill of exchange never having been paid :—

*Held*, that the plaintiffs had not lost their lien for damage by reason of laches, or by the subsequent sale of the vessel.

CAUSE of damage, in which the following facts, which were undisputed, were stated in the form of a special case for the opinion of the Court on the questions of law involved.

On the 13th of March, 1866, the French schooner *Charles Amelia*, of which the owner was a Frenchman named Lapégue, and which was under the command of a Frenchman named Guicheney, came into collision with an English schooner, the *Risk*, in Bridlington Bay, and in British waters.

The master of the French schooner admitted his liability to make good the damage caused by the collision, and signed the following agreement :—

“Bridlington Bay, March 15, 1866.

“Memorandum of agreement made this day between Robert Benzie, owner of the schooner *Risk*, of Rochester, on the one part, and Captain Bernard Guicheney, of Bayonne, on the other part.

“That said Robert Benzie hereby agrees to receive the sum of 45*l.* clear money as a full discharge of his claim against Bernard Guicheney for the damage which his the said Robert Benzie’s schooner *Risk* has sustained in the fouling of the two vessels; but the sum does not include the claim of the boatmen who assisted the *Risk* into this place, nor any law expenses that may be contingent on the adjustment of the same, the whole of which, namely, the salvage of ships and other charges, are to be fully and entirely borne by the said Bernard Guicheney.

“Furthermore, the said Robert Benzie does not hereby prejudice

any claim that he may have to make on this matter if the money is not paid at the agreed time, nor does he bind himself to consider this as a proper compensation should he ultimately have to sue for the cost of the damage the *Risk* has sustained.

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“B. Guicheney.

“Robert Benzie.”

“Witness to both signatures,

“T. A. Murray.

“Hy. W. H. Knocker, Comdr. R.N.”

It appeared that a further expense was incurred of 33*l.* 13*s.* for the payment of the boatmen who took the *Risk* into harbour. The master of the French schooner declared that he was going to Sunderland, and, in order to avoid the arrest of his vessel, he, at the suggestion of the French consul, gave to Benzie and Day, the following bill of exchange, drawn upon the French owner of the vessel:—

“Bridlington Quay, March 19, 1866.

“82*l.* 5*s.* 0*d.*

“Three days after my arrival in Sunderland pay to the order of Benzie and Day, of Maidstone, in the county of Kent, Eighty-two pounds and Five shillings for value received on behalf of my ship the *Charles Amelia*.

“B. Guicheney.

“To Mr. Armand Lapégue, ship owner, Bayonne.”

The plaintiffs, in consequence, forbore to arrest the French schooner, which sailed from Bridlington on the 19th of March. The French schooner, however, never went to Sunderland, but the master, in fraud of his agreement with the plaintiffs, took her to France, and she had never been to Sunderland.

On the 27th of March the plaintiffs' solicitors wrote to the French owner Lapégue, as follows:—

“27, Leadenhall Street, London,

“27th March, 1866.

“Sir,—Your vessel called the *Charles Amelia* recently caused some damage to a vessel called the *Risk*, and Captain Guicheney ultimately agreed that the amount of damage so caused was 82*l.* 5*s.* For this sum he drew a bill of exchange upon you, which he handed to Messrs. Benzie and Day, the owners of the *Risk*.

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He promised to pay the amount of this bill of exchange so soon as the ship arrived in Sunderland, but up to the present time we cannot find that he has arrived; at all events the bill remains unpaid, and we have now to request that you will be good enough to instruct your correspondents in this country to pay, either to Messrs. Benzie and Day, or to us on their behalf, the said sum of 82*l.* 5*s.* in exchange for the bill of exchange drawn by the captain upon you.

“We are, Sir,

“Yours obediently,

“Elmslie, Forsyth, and Sedgwick.

“Monsieur Armand Lapégue, Bayonne.”

To this letter the following answer was received by the solicitors on the 2nd of April:—

“Messrs. Elmslie, Forsyth, and Sedgwick,

“27, Leadenhall Street, Londres.

“Bayonne, 30 Mar. 1866.

“J’ai en mon pouvoir votre honoreè de 27 courant. Il est vrai que le Capitain Guicheney a signé une traité, mais d’après ce qu’il m’écrit cette signature lui a été extorquée. Aujourd’hui qu’il est sur le territoire français il protest, et je ne peux vous dire si je paierai cette somme avant d’avoir lu son rapport.

“Armand Lapégue.”

No part of the 82*l.* 5*s.* had ever been paid, and the bill of exchange had been brought into court. Sometime in January or February, 1867, Lapégue, while still sole owner of the *Charles Amelia*, became bankrupt at Bayonne. According to the French law, certain persons were duly appointed syndics or assignees of his estate; and on the 26th of August, after taking the preliminary measures required by the French law, they caused the schooner to be sold by public auction. The defendants, being the highest bidders, and having no notice or knowledge of the collision, purchased the schooner, which was in due form of law transferred to them. She made a sea voyage in their name and at their risk, but it was admitted that this fact in no way affected the case. The schooner returned to British waters in December, 1867, and was arrested at Dover in the present suit.



Nov. 6, 1868. *Lushington*, for the plaintiffs, referred to the *Europa* (1), the *Bold Buccleugh* (2), the *Chieftain* (3), the *Bengal* (4), *Castrique v. Imrie* (5), and argued that the sale by order of the French Court was not binding; that it was not on the same level as a sale by order of the Court of Admiralty; and that therefore the lien travelled.

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*Butt*, for the defendants, relied upon articles 191, 193, 194, 197, 435, 436, 534 of the Code de Commerce, and contended that the plaintiffs had been guilty of laches in neglecting to enforce their rights; and that the vessel having been sold by a competent court, they had lost their lien on the vessel, and could not recover.

*Cur. adv. vult.*

Nov. 17, 1868. SIR R. PHILLIMORE [after stating the facts as above]:—The following propositions of fact and law are uncontroverted. First, that the *Charles Amelia* has been a wrong-doer, and would in ordinary circumstances, notwithstanding the change in her ownership, have remained liable to make compensation to the English vessel for the wrong done to her. Secondly, that the document referred to as a bill of exchange—whatever be its proper title—has left this liability of the res or ship unaffected.

The case of the *Bold Buccleugh* (2) establishes the legal proposition that the obligatio ex delicto arising from the collision constituted a maritime lien which travelled with the ship to whatsoever owner she might belong.

But it has been contended by the defendants in this case that there are peculiar circumstances which take it out of the operation of the principle of law referred to. These circumstances are (1), the laches of the plaintiffs in the prosecution of their claim; (2), the sentence of a French court of justice which transferred the ownership of the vessel, free from all liabilities or claims, to the defendants.

The laches is alleged to have taken place at two distinct periods: First, in not immediately arresting the ship, but allowing her to depart in the circumstances which I have stated. It is urged that

(1) Brow. &amp; Lush. 89.

(4) Swab. 463.

(2) 7 Moo. P. C. 267.

(5) 8 C. B. (N.S.) 1; 29 L. J. (C.P.)

(3) Brow. &amp; Lush. 212.

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the plaintiffs had six days at least during which it was competent to them to have arrested this vessel, and that having foregone their right, and lost their opportunity, they could not now enforce it to the detriment of the present innocent owners of the vessel.

It was further contended that the plaintiffs were, at all events, guilty of laches in not taking proceedings at Bayonne, which they knew to be the domicil of the then owner of the ship; and in support of these positions, the following passage from the case of the *Bold Buccleugh* (1) was relied upon: "This rule, which is simple and intelligible, is, in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay, where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosoever possession the thing may come." The case of the *Europa* (2) was also referred to. Having regard, however, to the admitted facts in this case, I am of opinion that the lien attached to this vessel by the wrongful act of her master has not been obliterated by any laches of the plaintiffs upon either of the occasions which have been adverted to. Not upon the first occasion, for the plaintiffs had every reason to rely on the good faith of the French master, guaranteed as it was in a great degree by the French consul, and had no reason whatever to anticipate the fraud of which it is admitted the French master was afterwards guilty. Not upon the second occasion, for they took reasonable steps to recover the debt by the correspondence which I have read. They received no notice whatever of the bankruptcy of the French owner, or of the intended sale of the vessel, and it would be, in my judgment, a misconception of what the law means by laches to consider them guilty of it because they did not personally pursue the French owner of this vessel to Bayonne, and embark in litigation before a foreign court; which must have been expensive on account of bringing over witnesses, and uncertain on the point of jurisdiction.

There remains to be considered the second branch of the defence, namely, the effect of the sentence of the French tribunal. I have considered the passages in the French Code de Commerce which relate to the sale of this vessel.

(1) 7 Moo. P. C. at p. 285.

(2) Brow. &amp; Lush. 89.

I am by no means satisfied that an obligatio ex delicto, such as exists in the present case, would—regard being had to all the circumstances, especially that the obligee was a foreigner resident abroad, and wholly ignorant of the proceedings—be considered by those who administer French law to have been extinguished by this “vente en justice.” The proceedings in the French court were certainly not proceedings “in rem,” but apparently resembled those which would be taken in bankruptcy in this country, which would not extinguish a maritime lien. I must also consider that the lex loci commissi delicti and the lex fori agree in holding that the maritime lien on this vessel still subsists.

Upon the whole, I am of opinion that the plaintiffs are entitled to recover in this suit; and I therefore decree in favour of the plaintiffs, and pronounce for the damage proceeded for, and condemn the defendants therein, and in costs, and direct that the accounts and vouchers relating to such damage be referred to the registrar and merchants to report as to the amount thereof.

Attorneys for plaintiffs: *Elmslie, Forsyth, & Sedgwick.*

Proctors for defendants: *Deacon, Son, & Rogers.*

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## [IN THE ARCHES COURT.]

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April 30.

## SHEPPARD v. BENNETT.

*Church Discipline Act (3 & 4 Vict. c. 86)—Letters of Request—Discretion of the Court to accept or refuse in case of alleged Heresy.*

The right of the Court of Arches to refuse letters of request until proper grounds were assigned why they should be accepted, which existed previously to the passing of the Church Discipline Act, has not been taken away by that statute.

The Court of Arches has therefore a right to exercise its discretion, and may refuse to accept letters of request in a matter of heresy, unless some reason is stated why it should accept them.

*Rev'd by P.C. & P.D. 452.*

THIS case came before the Court on a motion, praying the Court to accept letters of request in a cause of heresy promoted by Thomas Byard Sheppard, of Frome Selwood, Somerset, against the Rev. William James Early Bennett, the vicar of that parish.

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The question raised was, whether the Court had a discretion to accept or refuse such letters of request.

April 23. *A. J. Stephens, Q.C.*, and *Dr. Tristram*, appeared for the promoter.

*Cur. adv. vult.*

April 30. SIR R. PHILLIMORE. In this case an application has been made to the Court to accept letters of request from the Bishop of Bath and Wells, under the provisions of the 13th section of 3 & 4 Vict. c. 86, an Act for the Discipline of the Clergy.

It appears, from the recital in these letters, that the Rev. William James Early Bennett, a clerk in holy orders, vicar of Frome Selwood, has been charged with committing an offence against the laws ecclesiastical, by the publication of a work containing heretical doctrines, in the diocese of London. The preferment of the accused clerk was situated in the diocese of Bath and Wells—the alleged offence was committed in the diocese of London: therefore, if the accused clerk was to be criminally proceeded against in the ecclesiastical court, the provisions of the statute to which I have referred rendered it necessary that these proceedings should be taken, in the first instance, under the authority of the bishop in whose diocese the alleged offence had been committed. The late Bishop of London issued a commission to certain persons to inquire into the grounds of the charge, and to report to him whether or no there was a case for further inquiry. They reported that there was a case for further inquiry. That report, and the evidence upon which it was founded, were afterwards filed in the registry of the diocese of Bath and Wells, according to the requirements of the statute; and it became necessary that any further proceedings in the matter should be carried on under the authority of that ordinary. The statute provides, s. 11, that after the report of the commissioners, “the bishop shall proceed to hear the cause, with the assistance of the assessors;” . . . “and upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon, according to the ecclesiastical law.” The statute further provides, s. 13, “that it shall be lawful for the bishop . . . if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient



prima facie ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case, by letters of request, to the court of appeal of the province, to be there heard and determined, according to the law and practice of such court." The Bishop of Bath and Wells has availed himself of this latter alternative, and has sent this case, by letters of request, to the Court of Arches.

It is to be observed that the statute does not empower the bishop to send the case simpliciter to the court of appeal, but to send it by letters of request to that court. If these letters are accepted by me, and the request of the inferior court complied with, a decree, which is equivalent to a citation, will issue from this court; the accused clerk will be cited, and the trial will take place, in the first instance, before this Court.

It has been argued that these letters of request are in truth letters of command, and that I have no option but to accept them. This argument is maintained, both by referring to the express words of the statute of the Queen, and to the law and practice with respect to letters of request previously to the passing of that statute. I am about to pronounce my opinion upon the soundness of this argument; and in order to make the conclusion at which I have arrived fully intelligible, it will be necessary to state at some length the premises upon which it is founded.

First of all, however, it may be well to consider the necessary consequences which flow from the position of law.

It is the plain duty of every bishop, having regard both to the nature of his office and to the obligations which at the time of his consecration he takes upon himself, to maintain within his diocese ecclesiastical discipline, and especially as to matters of heresy, such as are the subject of the present charge. But if the argument which has been addressed to me be sound, every bishop in the province of Canterbury may devolve, at his own will and pleasure, upon the court of the archbishop, the execution of the most arduous part of his duty as diocesan. It is not necessary that he should state any reason for so doing; the natural order of things is reversed, and the inferior sends a mandate to the superior judge, which, without inquiry, he must obey. It is not too much to say that such an exposition of the law requires to be very clearly

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demonstrated before it can be accepted. Inasmuch as letters of request are the technical description of a proceeding appertaining to ecclesiastical law—words of art, so to speak, derived from that system of jurisprudence—the examination of the question naturally falls under the two following divisions:—

1. The law which prevailed before the statute 3 & 4 Vict. c. 86.
2. The law introduced by that statute.

Upon the first division of the subject the following observations have occurred to me. It is hardly necessary to state that the proposition that a bishop can order his metropolitan or archbishop to do a particular act, such as to entertain a suit, is not to be found in the general ecclesiastical law. That law as well as the common law of England has indeed been careful to protect the bishop from any undue assumption of jurisdiction by the archbishop over him; but I am not aware of any instance in which the law has thought it necessary to protect the archbishop from the usurpation of his suffragan. “Letters of request,” “*Literæ requisitionales*,” as they are called in Oughton, are a form of procedure peculiar to the canon law, and certainly do not in their natural construction imply a command. A very learned judge, however, Sir George Lee, in the case of *Butler v. Dolben* (1) is reported to have said:—“As to the discretion of this Court, whether it shall accept or refuse letters of request when granted by a proper judge, the delegates held in the case of *Dr. Pelling v. Whiston* (2) that the Dean of the Arches was bound to receive them *ex debito justitiæ*; but that it was in the discretion of the inferior judge whether he would grant them.” As this is, I believe, the only authority which can be cited in support of the position that the acceptance of the letters of request is obligatory upon the superior Court, I have thought it right to examine very carefully the circumstances of this case; they are very remarkable:—The case of *Pelling v. Whiston*, which was argued in the years 1712—13, happened at a time of great political excitement, in which the church was largely concerned, and which was not without its influence on the proceedings in this case. I remember that Lord Stowell said, as to a case decided in 1792, in which religious and political feelings were much mixed up:—“I shall pass over a

(1) 2 Lee, 312, 317.

(2) 1 Com. Rep. 199.

case which has been cited from the State Trials, as it was one of party heat, that took place in times of party ferment, and is of smaller authority on that account:" *Hutchins v. Denziloe and Loveland*. (1) The history of the proceedings of this extraordinary case are to be found partly in Burnett's History of his Own Times, vol. 6; partly in an account Whiston published of his own case in 1715, and partly in a note of Chief Baron Comyns (who was one of the counsel in the cause) of the proceedings before the delegates. (2) As the delegates never gave reasons for their judgment, but little information is to be extracted from the record of their proceedings. Towards the close of the year 1710, convocation had been summoned by the Queen for the transaction of business, mainly, if not exclusively, that it might pass a synodical judgment upon the writings of Whiston. Great doubt arose as to whether it was competent to that body to censure heretical doctrines and their maintainers; the opinion of the twelve judges and of the law officers of the Crown was in compliance with an address of convocation taken by the Crown in 1711. Convocation was authorized to pass a sentence upon his works, which they condemned; but, from various reasons, the condemnation seems to have had no practical result; and in 1712 a Dr. Pelling, as a voluntary promoter of the officer of the judge, filed articles of heresy against Whiston, who dwelt within the exempt and peculiar jurisdiction of the dean and chapter of St. Paul's. The commissary of that Court, Dr. Harwood, sent the case by letters of request to the Court of Arches: the Judge of the Court of Arches, Dr. Bettsworth, alleging that there was "no suggestion of any reason why the cause should not be brought before the proper ordinary," in February, 1712, Dr. Harwood sent new letters of request, alleging as grounds that as commissary he had not authority to inflict a proper punishment for heresy, as he had no commission from a bishop; or, according to the minutes of the delegates' process book, "on account of gravity of matter, and doubt whether commissary could inflict proper punishment, he humbly repeats his request." While the Court of Arches was considering the application of Dr. Harwood, it seems that Dr. Pelling prayed an original citation, not by letters of request, but under the statute of 23 Hen. 8, c. 9,

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(1) 1 Consist. Rep. at p. 174.

(2) 1 Com. Rep. 199.

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to which I shall presently advert. On the 16th of February Dr. Pelling renewed his application; on the 25th of February the judge of the Court of Arches—according to the report in Comyns (at p. 199)—“decreed that letters of request from Dr. Harwood lie not before him, because in a case of heresy the bishop of the diocese hath jurisdiction in places otherwise exempt within his diocese, and notwithstanding the statute of citation, an heretick may be cited to appear before him upon letters of request from the judge of the peculiar, or by process sub mutuo, &c., and therefore he cannot decree a citation,” &c. On the 2nd of March, Pelling appealed to the delegates, to which appeal Whiston was no party; but the Judge of the Arches seems to have been heard by counsel, who argued, according to the report, as follows:—“That a superior judge is not obliged to accept letters of request, for no law saith that he is so obliged, and it would be inconvenient, since the fees would all belong to the inferior judge, and unreasonable since the superior judge cannot oblige the inferior to grant such letters of request, and therefore ought not to be obliged to accept them: secondly, the inferior judge in this case had no jurisdiction, for he cannot excommunicate, degrade, or deprive.” “Statute 2 Hen. 4, c. 15, speaks of the bishop of the diocese, and so does 10 Hen. 7, c. 17. Thirdly. The bishop of the diocese hath jurisdiction in case of heresy in places exempt. Fourthly. There was no cause depending before Dr. Harwood, and the Arches have jurisdiction only in case of appeals by patent.”

To this argument it was replied, that the bishop was by express words of the 23 Hen. 8, c. 9 (the bill of citations) restrained from citing any person dwelling in a peculiar before him, and that this case was not within the exceptions mentioned in the statute. That there was no appeal from the commissary of St. Paul's to the bishop; and, on the other hand, it was provided by s. 4 of the statute—“That it shall be lawful to every archbishop of this realm to cite any person inhabiting in any bishop's diocese within his province for causes of heresy, if the bishop, or other ordinary immediate thereunto, consent, or do not his duty in punishment of the same,” and that, on the whole, “the judge of the Arches, by refusing a citation, not letters of request, denied justice.”

The delegates reversed the sentence of the Arches; but upon



what grounds does not appear. Whether because he ought to have issued an original citation under the 4th section of the act, or because sufficient grounds were laid by the second letters of request for his acceptance of them (in the present case before me, it will be remembered that no grounds are laid), and he had exercised his discretion improperly in not accepting them; or whether he was bound, without any grounds assigned, to have accepted them, though the latter suggestion, for a reason which I will presently state, seems to have been very improbable.

Whiston always protested against the jurisdiction of the delegates, upon the ground that he was no party to the appeal, and that they were acting as a court of original jurisdiction, which they had no power to do; and certainly they were acting in a most unusual manner in this respect. It appears that the delegates did not agree amongst themselves; there was a commission of adjuncts—they arrived at no conclusion; and it is believed that the whole affair was put an end to on the accession of George I., by a general act of amnesty which included heresy.

I have considered this case at so much length because it is the only one upon which Sir G. Lee founds his dictum in *Butler v. Dolben*. (1) *Whiston's Case* was in 1712, and *Butler v. Dolben* was in 1756.

Dr. Hay, the most eminent civilian of his day, argued in the latter case, "that the statute (2) authorizes the Court to judge of the reasons on which letters of request are granted. This is a new case arising upon the late statute of marriage; the doubtfulness of the jurisdiction is good ground for receiving the letters of request." And what is more remarkable, Dr. Bettesworth the younger, the son, I believe, of the judge of the Arches before whom *Whiston's Case* came, must have been familiar with it; but he argued that "the granting and receiving letters of request are discretionary." The reference of Sir George Lee to the supposed dictum of the delegates in *Whiston's Case* could not have been founded, as the dates show, on personal knowledge, no note or report of any such dictum is to be found. The dictum, moreover, was unnecessary for the decision in *Whiston's Case*, and was not necessary for the decision in *Butler v. Dolben*, at which Sir George Lee arrived;

(1) 2 Lee, 312, 317.

(2) 23 Hen. 8, c. 9.

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which was, that the Arches Court had power of accepting letters of request in a matrimonial suit; and that where it was doubtful in which of two jurisdictions the party had his domicile, the Arches Court might accept joint letters of request. And this seems to have been considered by Sir Herbert Jenner, in the case of *Steward v. Bateman*, decided in 1842 (1), as the only point which was decided by Sir George Lee.

The statute of 23 Hen. 8, c. 9, s. 3, enacts that "the bishop may make request or instance to the archbishop, bishop, or other superior ordinary or judge, to take, treat, examine, or determine the matter before him or his substitutes; and that to be done in cases only where the law, civil or canon, do affirm execution of such request or instance of jurisdiction to be lawful or tolerable." This very enactment surely implies a power in the Court of Arches to examine whether the law, civil or canon, does affirm the execution of such request to be lawful. Such, moreover, has been the invariable practice up to the time of passing the 3 & 4 Vict. c. 86,\*to assign grounds why the letters of request should be accepted. This practice was deemed proper and reasonable by the Courts in Westminster Hall, for in the case of *Jones v. Jones*, reported in Hobart, p. 185, it having been maintained by the civilians that it was absolutely in the power of the ordinary to send any cause to the archbishop at his will without assigning any special reason, for which they cited the authority of divers canonists, Hobart (and as it seems, the Court) said, "That to expound the statute thus, viz.: that the ordinary may, at his will and pleasure send the subject from one end of the kingdom to another without cause, was both against the letter of the statute, and did utterly elude it; that the purpose of the law was to provide for the ease of the subject more than for the jurisdiction of the ordinary; which appears in that there is action given to the subject and penalty to the King for the vexation, but none to the ordinary; and that this very clause says it is to be done in cases only, &c., which would be a vain correction, if it left it as general as before, i.e., if it were lawful or tolerable in all cases without cause." My predecessor in this chair, Sir H. J. Fust, in 1842 decided, in a very elaborate judgment, *Steward v. Bateman* (2), to refuse letters of request presented to

(1) 3 Curt. 201, 206.

(2) 3 Curt. 201, 208.

him jointly by the archdeacon and the chancellor of Norwich, observing indeed, "My object is not to withhold the jurisdiction of this Court, but to guard against any question arising in respect to the proper form of exercising it." The decision of Sir George Lee was much referred to by the counsel and by the judge, but I do not find it to have been suggested by either that the accepting letters of request was compulsory on the Court of Arches. I do not mean to assert that the Court of Arches exercises a discretion from which there is no appeal as to accepting or refusing letters of request. There are various instances, such as that of granting or refusing a faculty, in which the Court exercises its discretion; but the exercise of such discretion may be controlled and modified on an appeal to the superior court. So far, therefore, as the law and practice previously to the passing of the present Clergy Discipline Act are concerned, I think the Court of Arches had a right to refuse letters of request until proper grounds were assigned why they should be accepted. Secondly, I have to consider whether the enactments in 3 & 4 Vict. cap. 86, have taken away such discretion as previously existed. Now it is, in the first place, remarkable that this statute has given the bishop greater personal power than he ever previously possessed, and greater assistance in the exercise of that power. He may hear a cause of this kind sitting in person, with the aid of assessors, which he could not do previously to the passing of this statute. He may also send the case, by letters of request, to the court of the province; but the statute does not enact that the court of the province must accept them when sent, or that it may not require reasons why it should accept them. Moreover, it has been ruled in the case of *Reg. v. The Bishop of Chichester* (1), by the authority of Mr. Justice Wightman, Lord Campbell, and Mr. Justice Erle, for Mr. Justice Wightman expressly stated in his judgment that the two latter judges concurred with him in opinion, that the bishop had such a discretion, while the remaining judge (Mr. Justice Hill) agreed that the bishop had such a discretion in the particular case which was before the court. And in *Sherwood v. Ray* (2) the Judicial Committee of the Privy Council, a member of which was Sir John Nichol, the most experienced of all ecclesiastical judges,

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(1) 2 E. &amp; E. 209; 29 L. J. (Q.B.) 23.

(2) 1 Moo. P. C. 353.

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laid down the law as follows:—"And it is to be recollected that this may be the only form in which any individual can question the marriage as a matter of right, for to promote the office of judge in a criminal suit requires the authority and consent of the Court, and, though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito justitiæ*."

I have referred to the clause in the statute enabling the bishop to send the case without inquiry, in the first instance, by letters of request, to the court of appeal. Surely it would be a strange thing if a discretion as to allowing a suit to be instituted were vested in the bishop and denied to the archbishop represented by his court. If any good grounds were stated, or if it appeared from the nature of the case that the interests of justice would be promoted by my acceptance of these letters of request, I should certainly exercise my discretion in favour of accepting them. I have done so in cases where clerks have been charged with immorality, because there was a manifest advantage both to the parties and to the church that a court of law, accustomed to the oral examination of witnesses and to the investigation of evidence, and aided by the assistance of able counsel, should deal in the first instance with such cases. But the present letters of request are tendered to me in a matter of alleged heresy connected with some of the most awful mysteries of our religion. Surely that is a case on which, of all others, the bishop ought to exercise his jurisdiction. No reason whatever is stated to me why he should not do so. Courts of appeal are in the habit of saying that they will not entertain grave questions in the first instance, because they have a right to the advantage of the judgment of the inferior Court. This doctrine has been frequently maintained by the Judicial Committee of the Privy Council, when attempts have been made to induce them to retain causes appealed to them upon some incidental point. Why should the court of appeal of the province be deprived of this advantage in a matter which, I must repeat, is, of all others, fittest for the cognizance and decision of the bishop of the diocese?

I must decline to accept these letters of request until some reason at least is stated why I should do so.

Proctors for promoter: *Moore & Currey*.



## THE MARGARET JANE.

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Jan. 27.

*Salvage—Jurisdiction—25 & 26 Vict. c. 63; 31 & 32 Vict. c. 71, s. 9—Costs—*  
*Damages.*

A salvaged vessel was valued by a Receiver of wreck at 746*l.* on the 3rd of December. On the 8th the salvors instituted a suit in the sum of 2500*l.*; on the 18th they applied for an appraisement of the vessel; on the 14th of January following they gave notice that they proceeded no further in the suit:—

*Held*, that the salvors must have been aware within a short time of taking out the appraisement that the value fixed by the Receiver was substantially correct, and that they must therefore be condemned in costs, and in damages from the 22nd of December to the 14th of January.

CAUSE of salvage instituted by the owners, master, and crew of the *Ezra*, for services rendered to the *Margaret Jane* on the 24th of November, 1868. On the 3rd of December the Receiver of wreck reported the value of the ship and cargo to be 746*l.* On the 8th of December the suit was instituted against the vessel, her freight, and cargo, in the sum of 2500*l.* On the 18th of December the salvors applied for an appraisement of the vessel; and on the 14th of January they formally declared that they proceeded no further in the suit.

*Butt, Q.C.*, for the owners of the *Margaret Jane*, moved the Court to condemn the salvors in costs and damages, on the ground that at the time when they instituted the suit they were aware that this Court had no jurisdiction, the value of the property saved being under 1000*l.*

*Clarkson*, contra, referred to the 9th section of the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), as reviving the jurisdiction of the Admiralty Court.

SIR R. PHILLIMORE. There is no doubt that this case comes within the provision of the Merchant Shipping Act (25 & 26 Vict. c. 63, s. 49), and is not affected by the Act of last session, 31 & 32 Vict. c. 71, s. 9.

It is admitted that the salvors must be condemned in costs; the only question is as to the damages. It has not been usual for this Court to make such a decree. The case of the *Evangelismos* (1), before the Privy Council, has been cited, in which their lordships

(1) Sw. 378.

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said (1): "Undoubtedly, if the arrest of the ship is an act of mala fides, or of that crassa negligentia from which the law implies malice, the Court of Admiralty would be justified in giving damages, as in an action brought at common law damages might be obtained. In the Admiralty Court, however, the proceeding is very convenient, because in the action in which the main question is disposed of damages may be awarded."

In this case there is certainly no mala fides, and the salvage of the derelict vessel (for such it was) appears to have been one of considerable merit, and it has happened that the officer of the Court has appraised vessels at a higher value than the Receiver of wreck. I think it would be harsh, therefore, to say that when the commission for the appraisement in this case was taken out on the 18th of December that the salvors were guilty of crassa negligentia; but I think they must have been aware within a short period after the time of taking out that appraisement that the value fixed by the Receiver of wreck was substantially correct, and I shall condemn them in costs altogether, and in damages from the 22nd of December to the time when this vessel might have been released, namely, the 14th of January.

Proctors for plaintiffs: *Clarkson & Co.*

Proctor for defendants: *T. Cooper.*

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#### THE FREEDOM.

##### *Damage to Cargo—Pleading—Particulars.*

In a cause of damage to cargo, the petition alleged that certain parcels of oilcake were not delivered in good order and condition according to the terms of the bills of lading; and that the damages were the consequences of breaches of the contracts in the bills of lading, or that they were occasioned by negligence or breach of duty on the part of the master or crew:—

*Held*, on motion by the defendants to order the plaintiffs to give particulars of the allegations, that they were not bound to set out the particular acts or the character of the negligence which caused the damage.

SUIT by the indorsees of six parcels of oilcake to recover damages for non-delivery of the oilcake in good order and condition.

(1) Sw. at p. 381.

The petition alleged (art. 3) that by the bills of lading six parcels of 500 bags of linseed cake were "shipped in good order and well conditioned on board the *Freedom* at New York . . . to be delivered in the like good order and condition at the port of London, the dangers of the seas only excepted."

6. "That the said six parcels of 500 bags were not delivered to the plaintiffs, according to the terms of the said bills of lading, in as good order and condition as when they were shipped on board the said vessel at New York as aforesaid; but, on the contrary, the same were delivered to the plaintiffs much damaged, and in much worse order and condition."

11. "That the damages were the consequences of breaches of the contracts contained respectively in the said bills of lading, or they were occasioned by negligence or breach of duty on the part of the master or crew of the said ship."

The defendants, in their answer, denied the allegations in the petition, and alleged that "the damage (if any) to the oilcake was occasioned by the dangers of the seas, or by the natural qualities of the said oilcake, and not by any breach of contract contained in the bills of lading, or by any breach of duty on the part of the master or crew of the *Freedom*."

The case came before the Court on a motion by the defendants to order the plaintiffs to give particulars of the negligence or cause of damage.

*Cohen* appeared for the plaintiffs.

*Clarkson*, for the defendants.

The arguments and the cases cited are sufficiently referred to in the judgment.

SIR R. PHILLIMORE. This is a suit instituted by the indorsees of bills of lading of certain parcels of oilcake laden on board the vessel *Freedom* against that vessel.

A petition and answer have been filed. Application is now made by the plaintiffs to the Court to order the defendants to furnish particulars of the negligence or cause of damage. The counsel for the applicants (the defendants) relied on the 67th rule of this Court, and contended that the plaintiffs had filed such a plead-

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ing as would oblige the defendants, unless particulars were given, to prepare different lines of defence, inasmuch as the plaintiffs had pleaded not only breach of contract, but negligence, on the part of the defendants; and that they, the plaintiffs, ought to furnish particulars of such negligence. The plaintiffs contended that by the bills of lading in this suit the owners of the *Freedom* contracted, by their servant, the master, to deliver the oilcake in question "in the like good order and condition at the port of London, the dangers of the seas only excepted," as they had been shipped on board the vessel; that, therefore, it was only incumbent upon them, the plaintiffs, to prove that the oilcake was shipped in good, and delivered in bad, condition; that it was for the defendants, if they could do so, to establish by proof that the deterioration was caused by the only specified exception to the obligation contained in their contract, namely, "dangers of the seas"; and that, with respect to the averment in the 11th paragraph of the petition—namely, "the damages hereinbefore mentioned as having been sustained by the plaintiffs, were the consequences of the breaches of the contracts contained respectively in the said six bills of lading, or they were occasioned by negligence or breach of duty on the part of the master or crew of the said ship"—such averment as to negligence was pleaded to guard against the possibility of the contract not being technically holden to have passed to the indorsees, who would, nevertheless, it was contended, under the authority of *The Figlia Maggiore* (1), be entitled to sue the defendants on the ground of damage accruing from negligence.

The cases of *Kay v. Wheeler* (2), *Lloyd v. Iron Screw Collier Company* (3), *Czech v. General Steam Navigation Company* (4), were cited by the counsel for the plaintiffs. *The Figlia Maggiore* (1) was referred to by counsel for the plaintiffs and for the defendants. The principal object of the rules of pleading in this Court is to prevent either party being taken by surprise at the hearing of the cause, and to obviate the necessity of the trial being postponed upon this ground. The pleading by the plaintiff and the defendant ought to be such as fairly to apprise the adversary of the nature of the case, whether of attack or defence, which is meant to

(1) Law Rep. 2 A. & E. 106.

(2) Law Rep. 2 C. P. 302.

(3) 3 H. & C. 284; 33 L. J. (Ex.) 269.

(4) Law Rep. 3 C. P. 14.

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be proved. The rules and the practice are intended to ensure brief and fair statement, and to avoid prolix or obscure pleading. In deciding whether the pleading complies with the principle of fairly disclosing the nature of the case intended to be proved, it must be considered whether the matter charged be or be not within the knowledge of the party charged. In the case before me, if damage was done to the goods it was done on board the ship of the defendants, where the plaintiffs were not. The cause of the damage must be presumed to be within the knowledge of the defendants, and, accordingly, in their answer they have stated what the causes of the damage were, if any damage, which they do not admit, was done.

It is to be borne in mind, also, that if the fact of the damage be established by the plaintiffs, the burthen of proving affirmatively that such damage was the consequence of the excepted perils lies unquestionably upon the defendants; and I think that the burthen of proving affirmatively that due care was taken of the goods also lies upon them. If there was negligence in this respect, it must be presumed to be within their knowledge, and it does not appear to me that the plaintiffs are bound to set out the particular acts or the character of the negligence which caused the damage on board the defendants' ship. If, indeed, during the trial it should appear that the plaintiffs relied upon a particular act of negligence of which they were aware, and to which they ascribed the damage, and which took the defendants by surprise, I should be disposed to afford the defendants every opportunity of producing evidence in contradiction, but I cannot anticipate any such case; and as I think, having regard to the character and wording of the contract contained in these bills of lading, that the pleading of the plaintiffs fairly apprises the defendants of the case which they have to meet, I shall not make an order upon them to furnish further particulars.

Attorneys for plaintiffs: *Thomas & Hollams.*

Proctor for defendants: *T. Cooper.*

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April 13.

THE ESK.

THE GITANA.

*Collision—Vessel with Anchor down, but not held by it—Coloured Lights.*

A vessel with her anchor down, but not actually holden by and under the control of it, is "under way" within the meaning of the Admiralty Regulation (1858), and is bound to exhibit coloured lights.

**COLLISION.** Cross-causes of damage in respect of a collision between the *Esk* and the *Gitana*. The circumstances are fully stated in the judgment.

*Dr. Deane, Q.C., and Bayford, for the owners of the Gitana.*

*Milward, Q.C., and Clarkson, for the owners of the Esk.*

**SIR R. PHILLIMORE.** This is a cause of collision between the brig *Gitana* and the schooner *Esk*; these are cross-actions. The *Gitana* is a Prussian brig of 323 tons register, with a crew of ten hands, and was on a voyage from Memel to London laden with staves. Between 11 and 12 o'clock at night, on the 13th of November, 1868, she was running up under the charge of a pilot (who had boarded her off Lowestoft) between the Sunk and the Gunfleet Sands; she was under all plain sail, the tide was high-water, slack, the wind was northerly, probably at some point between N.N.E., and N. by W., she was heading W.S.W., her captain and the pilot were both on the starboard side of the quarter-deck, and about 11.30 they both saw a white anchor-light about half a point on the starboard bow at the distance of a quarter of a mile; they did not see the vessel which carried it; the night appears to have been dark and hazy; this vessel was the *Esk*. The pilot of the *Gitana*, supposing, as he says, the light to be that of a vessel riding, starboarded to pass under her stern; the light opened a point-and-a-half to two points, sufficient, he says, for him to clear; he gave the order to "steady;" at that time he still saw the white light; then shouting was heard, and the *Esk* was seen at the distance of about a cable and a half with her boom-foresail and inner-jib set; the shouting from the *Esk* was, "port your helm, we are shifting our berth, we are still at anchor," or, "our anchor is still down." The pilot ordered the helm hard-aport instantly, and

almost immediately the vessels came into collision; the *Gitana's* jib-boom caught the fore-stays of the *Esk*, and afterwards their hulls came together; the *Gitana* backed her yards to clear the vessels, and at the request of the pilot the *Esk* paid out more chain, which was heard to run over the windlass quick; the pilot swears that the *Esk* was in motion, and had moved a ship's length after he saw the white light. These appear to be the principal facts stated on behalf of the *Gitana*. The story told on the part of the *Esk* is, that she was a schooner of 117 tons, with a master and a crew of five hands, bound from the port of London to Sunderland; that at 5 o'clock in the evening of the 13th of November she brought up to the east of the Middle Buoy of the Gunfleet, a mile from the sand, anchored by her starboard anchor with thirty or thirty-five (for the quantity is variously stated) fathoms of chain, and heading east; three hours afterwards a brig anchored astern of her; her master says he could see a riding-light distinctly at the distance of a mile between 11 and 12 o'clock, at which time he called up all hands to get up the anchor; there is no doubt that the *Esk* had then and at the time of the collision a proper anchor light exhibited; the crew heaved in about fifteen fathoms of chain, the boom-foresail and inner-jib were then set; more chain, seven or eight fathoms, it is said, was then got in; when attention was called to a green light nearly three points on the port bow; the vessel carrying it (the *Gitana*) was seen a quarter of a mile off; the master of the *Esk* hailed as loud as he could that he was at anchor, and that his anchor was still down, the crew stopped getting in the chain, and the master swears that the anchor was then holding; the master says he hailed "Port," because the *Gitana* seemed to be coming in on his port bow; it is sworn that the anchor was on the ground at the time of the collision, and one witness swears that he was sure the anchor was not "tripped," for the chain was going over the windlass when the vessel struck them; it is further sworn that the *Gitana's* stem struck the *Esk's* cathead on her port side, and caused her to drive, and her anchor to come home;—these appear to be the principal facts in evidence on behalf of the *Esk*.

Upon this evidence, and upon all the circumstances of the case, two questions may arise, one of fact and one of law. The question of fact is, whether or no the anchor of the *Esk* was holding her at

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the time of the collision? Now, according to her own statement, the *Esk* saw the green light of the *Gitana* about three points on her port-bow; and the Trinity Masters advise me that if the *Esk* was, as she represents herself to have been, then stationary at her anchor, she could have no reason to suppose that the *Gitana* would not, under a starboard helm, pass her to the eastward; the *Esk*, however, hails the *Gitana* to port her helm, and at the same time hails that her anchor is “still down” or “down.” The Trinity Masters are at a loss to understand why, if the *Esk* were holden by her anchor, she should have hailed the *Gitana* to port her helm; while, on the other hand, if the *Esk* was not holden by her anchor, but had canted and was forging ahead, then the hailing to port the helm would be intelligible, because the *Esk* would in that case be crossing the bows of the coming vessel;—moreover, it strikes the Trinity Masters as a suspicious circumstance that a vessel with a proper anchor-light up, as the *Esk* certainly had, should nevertheless hail the fact of her being at anchor, which it is the very object of the light to indicate. The answer, that the *Esk* had hoisted her boom-foresail and inner-jib, which, unless she hailed that she was at anchor, might have deceived the approaching vessel, does not remove this suspicion; because the carrying of these sails in conjunction with a white light would not indicate to a person of competent nautical knowledge that she was under way.

Applying my own judgment to this advice so tendered to me by the Trinity Masters, I have arrived at the conclusion that the *Esk* was not holden by her anchor at the time of the collision.

The finding of this fact renders necessary the consideration of the question of law, which is of considerable importance, and which, I regret to say, I am called upon to decide for the first time. In the case of the *George Arkle*, in which the decision of this Court was affirmed by the Privy Council (1), it was ruled that a vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, “under way” within the meaning of the Admiralty Regulations (1858), and is bound to exhibit coloured lights; and that the omission in such circumstances to exhibit the coloured lights is negligence, notwithstanding the ship was in great difficulty and danger, and

(1) Lush, 382.



that the ship is liable for any collision occasioned thereby. This judgment furnishes some assistance to me, but is clearly not decisive of the present case.

The object of the Regulations, so far as their bearing on the present case is concerned, with respect to carrying lights, is to furnish the means of apprising other vessels whether the vessel carrying them be stationary or in motion, in order that the coming or meeting vessel may direct her course in consequence, and give the vessel carrying coloured lights and in motion a wider berth than she would give if that vessel carried an anchor-light and was stationary. This is the principle which underlies these rules; it is possible, no doubt, to draw fine distinctions between vessels which have just actually raised their anchor off the ground and those which are in the very act of doing so; but practically the true criterion as to the application of the Regulation must be, whether the vessel be actually holden by and under the control of her anchor, or not. The moment she ceases to be so, she is in the category of a vessel "under way," and must carry the appointed coloured lights. The case before the Court strongly illustrates the expedience of these Regulations; for had the *Esk* when she canted lighted and exhibited her lamps, which appear to have been ready, her red light instead of the white would have been visible to the *Gitana* in the first instance, and the *Gitana* would have ported then instead of starboarding, and this collision would have been avoided. It remains only to notice two positions of the counsel for the *Esk*, namely, that the collision was caused by a bad look-out, and "by too close a shore" on the part of the *Gitana*. The first contention is not supported by the evidence; and as to the second, the opinion of the Trinity Masters, from which I see no reason to differ, is, that the manœuvre of the *Gitana* would have afforded ample room for avoiding collision with a vessel holden by her anchor, as the *Esk* was in the circumstances rightly presumed to be. I pronounce the *Esk* solely to blame for this collision.

Proctor for owners of *Gitana*: *H. G. Stokes.*

Proctor for owners of *Esk*: *T. Cooper.*

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March 6:

THE QUEEN.

THE LORD JOHN RUSSELL.

*Collision—25 & 26 Vict. c. 63, s. 33—"Person in Charge"—Compulsory Pilot.*

By 25 & 26 Vict. c. 63, s. 33, in case of collision between two ships, it is the duty of "the person in charge" of each ship to render assistance to the other, and in case he fails to do so without reasonable excuse the collision shall, in absence of proof to the contrary, be deemed to have been caused by his wrongful act:—

*Held*, that the "person in charge" intended by that section is the master.

Two steamships, the *Q.* and the *R.*, each under the charge of a compulsory pilot, came into collision in the Thames. The *Q.* was solely to blame, and after the collision she rendered no assistance to the *R.*, and shewed no excuse for having failed to do so:—

*Held*, that the mere fact of her having a pilot on board did not exempt her owners from liability.

*Semble*, that, if the collision had been caused solely by the neglect of the pilot on board the *Q.*, the subsequent misconduct of the master in not rendering assistance would not have made her owners liable for the collision.

CROSS causes of damage in respect of a collision in the river Thames between two screw steamships, the *Lord John Russell* and the *Queen*, about eleven at night on the 29th of August, 1868. Both vessels were under the charge of licensed pilots by compulsion of law.

*Milward, Q.C.*, and *Butt, Q.C.*, appeared for the *Lord John Russell*.

*Dr. Deane, Q.C.*, and *Clarkson*, for the *Queen*.

At the hearing of the cause on the 27th of February before the Court and Trinity Masters, it was proved that immediately after the collision the *Queen* continued her course up the river, and "never spoke a word, and gave no assistance." (1)

(1) 25 & 26 Vict. c. 63, s. 33:—"In every case of collision between two ships, it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew to render to the other ship, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary

in order to save them from any danger caused by the collision: in case he fails to do so, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default," &c.

SIR R. PHILLIMORE, in giving judgment, after commenting upon the evidence, said :—In my opinion, upon the true construction of s. 33 of 25 & 26 Vict. c. 63, a presumption of law that the *Queen* is the wrong-doer, is raised against her by her conduct in running away directly after the collision, without any offer or attempt to assist the other vessel. Moreover, in the opinion of the Elder Brethren and myself, the result of all the evidence of the case is, that for this collision the *Queen* is solely to blame. I therefore pronounce the *Queen* solely to blame.

A more difficult part of my duty remains to be executed, namely, to determine whether the owners of the *Queen* are exempted from their liability by reason of their having a pilot, as it is commonly called, “by compulsion of law” on board. It has been argued on behalf of the *Lord John Russell*, that the *Queen* is not entitled to claim this exemption upon two grounds; first, upon the construction of s. 33 of 25 & 26 Vict. c. 63. And this upon two grounds; first, it is said that the “person in charge” intended by that section, must, having reference to the context, be deemed to be the master, and with this part of the argument I agree; secondly, it is contended that, whereas the master has been guilty, as in this instance, of a violation of his duty in offering no assistance to the other vessel which came into collision, he is by the words of the statute to be deemed alone to blame for the collision, and that it follows by necessary implication that the pilot-exemption, so to speak, is taken away. With this portion of the argument I am quite unable to concur. There is no doubt, on the assumption of course that the pilot is alone to blame for the collision, that his liability and the exemption of the master attached when that fact took place; and if it was intended by the statute to say that the subsequent misconduct of the master would remove the exemption and fix the liability of the collision upon the master, the language, in order to produce this result, ought to have been much clearer and plainer than I now read it to be.

The other ground alleged by the *Lord John Russell* is of a more serious character; namely, that the collision was not caused by the incapacity or error of the pilot alone, but by the want of that assistance in the discharge of his functions which he had a right to expect from the crew; in other words, that if there had been a

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proper look-out on board the *Queen*, the pilot would have been sooner apprised of the approach of the *Lord John Russell*, and being so apprised would have taken effectual measures for avoiding the collision. [After stating the evidence]:—

Upon this point I have thought it right to be mainly guided by the advice of the Elder Brethren; and they are of opinion that by a proper look-out the *Lord John Russell* would have been seen and reported at an earlier period; and that thereby, assuming the pilot to have discharged his duty, the collision would have been avoided. With that opinion I see no reason to disagree, and I therefore pronounce the *Queen* not exempt by reason of her having a pilot on board.

Proctors for the *Lord John Russell*: Clarkson, Son, & Greenwell.  
Proctor for the *Queen*: Thomas Cooper.

April 27.

## THE MALI IVO.

*Collision in Foreign Waters—Lis alibi pendens—Discretion of Admiralty Court to entertain Suit.*

In a cause of collision between two foreign vessels in the Bosphorus, with respect to which suits had been instituted in the Ottoman court:—

*Held*, that if the evidence established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were instituted in rem or in personam, the Court would suspend proceedings, or put the party to his election as to which Court he would have recourse to.

CAUSE of damage in respect of a collision between the Norwegian brig *Helmich* and the Austrian brig *Mali Ivo*, which was in tow of a Turkish steam-tug. The collision occurred on the morning of the 12th of December, 1866, in the Bosphorus, off Karah Point. On the 31st of December, 1866, the master of the *Helmich* instituted a suit for damages against the master of the *Mali Ivo*. On the 2nd of February, 1867, the master of the *Mali Ivo* cited the master of the steam-tug to appear before the Austrian consular court at Constantinople and answer for the damage, on the ground that it was exclusively imputable to him. On the 20th of



February the court referred the first plaintiff and defendant to prosecute their claims before the Ottoman maritime jurisdiction; whereupon the Norwegian withdrew his deposit for security for costs and abandoned the proceedings; and on the 25th of April he instituted a cause of damage in the English Court of Admiralty. On the 4th of March the Austrian defendant presented an appeal to the Imperial Royal Tribunal of Austria at Trieste, to which appeal the Norwegian was no party. That court overruled the decision of the consular court, and declared that it was competent to entertain the suit. The consular tribunal ordered the Norwegian to put in his reply within fourteen days. From this order the Norwegian appealed to the Imperial Royal Tribunal, which, on the 13th of August, annulled the decree as against him. From this decree the Austrian master appealed to the Court of Cassation at Vienna. What became of that appeal did not appear, but it was distinctly sworn by the attorney for the Norwegian plaintiff at Constantinople, that since the 20th of February last all proceedings on his part had been withdrawn.

The cause was heard before the Court and Trinity Masters on the 17th of April, when

*Dr. Deane, Q.C., and Clarkson,* appeared for the plaintiffs.

*Butt, Q.C., and Pritchard,* for the defendants.

The following cases were referred to as bearing upon the discretion of the Court to entertain the suit:—*The Bold Buccleugh* (1); *The Nina* (2); *The Lanarkshire* (3); *The Bengal* (4); *The John and Mary* (5); *The Laconia* (6).

*Cur. adv. vult.*

April 27. SIR R. PHILLIMORE. The circumstances in which this case comes before the Court are peculiar. The plaintiff and defendant are both foreigners—the former a Norwegian, and the latter an Austrian; and the collision from which the damage complained of ensued took place within the waters of the Ottoman dominions, namely, off Karah Point in the Bosphorus, and while

(1) 7 Moo. P. C. 283.

(4) Swab. 468.

(2) Ante, p. 44; and, on appeal,  
Law Rep. 2 P. C. C. 38.

(5) Swab. 471.

(3) 2 Spinks, 189.

(6) Brow. & Lush. 117.

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the Austrian vessel was being towed by an Ottoman steam-tug. It has been said by the counsel for the defendant, that this Court would not be anxious to entertain such a suit, but it has not been said, and could not with propriety have been said, that the Court had not jurisdiction over the subject. It is well known that the jurisdiction of the High Court of Admiralty extends to all cases of collision happening upon the seas, that is, within the ebb and flow of the tide. In a case now before me, much discussed both here and in the Privy Council—*The Halley* (1)—the collision took place in the Scheldt. It is true that in that case one of the parties was a British subject; but that circumstance does not affect the power of the Court to entertain the suit, though it is a circumstance to be taken into consideration if the Court possesses, as has been argued, a discretion whether or no it will allow its jurisdiction to be put in force. I do not mean to pronounce any opinion as to whether the Court does or does not possess any such discretion.

The discretion which the Court does possess, with respect to suits instituted by foreign seamen for their wages against foreign masters whose ships happen to be in one of the ports of this country, is certainly distinguishable in principle from a discretion to be exercised, as in the present case, for the purpose of preventing the subject of one foreign nation from suing the subject of another foreign nation in a cause of damage done to the vessel of the former upon the sea.

It is another and different question whether, if there be, as is contended in this case, a *lis alibi pendens*, the Court has not a discretion, or perhaps even a duty, to refuse the exercise of its jurisdiction upon the same subject-matter between the same parties, unless that litigation be discontinued. I am aware that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country at the suit of the plaintiff, and who came over to this country, and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here: *Cox v. Mitchell* (2); and I have considered that part of the case of *The*

(1) Ante, p. 3; and, on appeal, Law Rep. 2 P. C. C. p. 193.

(2) 7 C. B. (N.S.) 55; 29 L. J. (C. P.) 33. *6/11 MS 225*

*Bold Buccleugh* (1) which refers to this subject. I have referred, also, to the cases of *The Griefswald* (2), *The Lanarkshire* (3), *The Bengal* (4), and *The John and Mary* (5); and I have come to the conclusion that it would be my duty either to suspend proceedings in this Court, or to put the parties to their election as to which court they would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically instituted in *rem* or in *personam*. I am also of opinion, that the Austrian consular court of Constantinople would come within this category of a competent tribunal, inasmuch as, by the well-known capitulations, by treaty, sufferance, and usage, the Austrian empire, like other Christian states, has acquired from the Ottoman Porte an exclusive right of jurisdiction, to be exercised over its own subjects in suits of this kind within the limits of the Ottoman territory.

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As a matter of fact, however, I am satisfied that there is no suit pending between the litigants now before me on the same subject as that upon which I am now called to adjudicate. [After stating the facts as above]:—

I am of opinion, that upon the evidence before me, I must hold that the present plaintiff has discontinued the proceedings which he had instituted in the consular court.

The learned judge then reviewed the evidence with respect to the collision, and pronounced the *Mali Ivo* alone to blame.

Proctor for plaintiff: *T. Cooper*.

Proctor for defendants: *Waddilove*.

(1) 7 Moo. P. C. 283.

(4) Swab. 468.

(2) Swab. 430.

(5) Swab. 471.

(3) 2 Spinks, 189.

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Feb. 11.

## THE ST. OLAF.

*Practice—Amount of Bail—Repairs subsequent to Arrest—Value.*

A wrong-doing vessel was arrested in a cause of collision, having been herself injured in the collision. She was then repaired, and her value was materially increased by the repairs:—

*Held*, on motion for release of the vessel on bail, that she was only liable to the extent of her value at the time she was arrested, and that she ought to be released on bail to that amount being given.

**DAMAGE.** Motion for release of the defendants' vessel on bail being given for the value of the vessel at the time she was arrested. Subsequent to the arrest of the vessel, the defendants had effected such extensive repairs as to render her of much greater value than at the time of her arrest.

*Clarkson*, in support of the motion.

*Pritchard*, contra.

**SIR R. PHILLIMORE.** The law and practice of this Court in a proceeding in rem are laid down in the case of *The Bold Buccleugh*. (1) "A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches." Therefore, the maritime lien is the foundation of these proceedings. And in the case of *The Volant* (2) my learned predecessor gave this account of the liability of the owners in cases of a proceeding in rem, and the words are material, I think, for the decision of this case:—"The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel, and not further." The practice, I believe, therefore, has been invariably up to the present time to decree the release of the vessel when the value of it has not been disputed, and when the proper bail to the amount of that value has been tendered in Court. But it has been urged by the counsel for the plaintiff that a difference ought to be introduced into the practice of the Court in consequence of a statute passed subsequently to the decisions to which I have referred: the Admiralty Jurisdiction Act, 1861 (24 Vict. c. 10)

(1) 7 Moo. P. C. at p. 284.

(2) 1 Wm. Rob. at p. 388.



It is quite obvious that the object of the 33rd section of that act is simply this, to make the bail which has been given in the High Court of Admiralty good, so to speak, in the Court of Appeal, the bail-bond having been only given according to its language in the Court of Admiralty, and I believe some questions arose from time to time whether in the Court of Appeal that bond could be acted upon; and the usual course, I understand, has been to remit the case to the High Court of Admiralty, and then the bail-bond taken there has been effectually enforced. I am, therefore, of opinion that this statute does not affect the question at present before me, and does not, in principle, or according to the letter, introduce any variation in the familiar practice of the Court with respect to proceedings in rem, the foundation of those proceedings being, as I have already said, a maritime lien; or with respect to the practice of the Court to release a vessel when the full amount of her value has been tendered in Court either in money or by bail. Another objection, however, was taken, and it was urged that at least in this case the value of 1037*l.*, though admitted to be that of the ship at the time when she was arrested, is not the value at which she ought now to be released, and for this reason: it appears that since the *lis* has been pending in this matter, application was made to the Court by the foreign owner of the *St. Olaf* to be allowed to make certain repairs in his vessel. Certain repairs were made, and I will take it that these repairs were without the consent of the opposite party. I am still very clearly of opinion that they could not prejudice any right which the owners of the *St. Olaf* possessed before they were made. I am clearly of that opinion myself, because the right of the plaintiff who proceeds against the *St. Olaf*, was to have the value of the vessel at the time she was brought into Court, as far as the proceedings in rem are concerned. His right was to have this res made responsible for the damage inflicted upon his ship, so far as the value of it extended, and the repair of the vessel subsequent to the damage for the purpose of preventing a deterioration of the property could not in any way increase his right or the obligation of the other party. It left them, as I conceive, in statu quo in that respect. Therefore, on both grounds, with respect to the former practice of the Court being unaffected by the authority of

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1869 the statute to which I have referred, and also on the second ground  
 THE ST. OLAF, that the improved value by repairs since the collision, and since  
 the arrest does not alter the rights of the parties, I must pronounce against this claim, and decree the vessel to be released, and as this is confessedly an experiment, and, according to my judgment, an unsuccessful one, I must condemn the maker of it in costs.

Attorney for plaintiff: *Kerly*.

Proctor for defendants: *Waddilove*.

Feb. 16.

#### THE ROYAL CHARTER.

*Costs—Practice—Damage caused by Pilot employed compulsorily—Pleading.*

In a cause of damage by collision, it was pleaded and proved by the defendants, who admitted that their vessel was the wrong-doer, that the collision was caused by the fault of their pilot, whose employment was compulsory.

The Court condemned the plaintiffs in costs.

CAUSE of damage instituted by the owners of the *Clarinda* against the *Royal Charter*, in respect of a collision.

The defendants, in their answer to the petition, admitted that the *Royal Charter* was the wrong-doer, but pleaded that the collision was caused by the directions of a pilot, who, by compulsion of law, was at the time in charge of the vessel.

The plaintiffs replied in effect that the master and crew of the *Royal Charter* did not obey the orders of the pilot, and that the collision was caused by this disobedience.

The cause was heard by the Court and Trinity Masters, and the Court was of opinion that the pilot was alone to blame for the collision.

*Butt, Q.C.*, and *Pritchard*, for the defendants, claimed costs on the ground that they had admitted from the first that their vessel was the wrong-doer; but had proved that she was exempt from liability, as the collision was caused by the negligence of a pilot, whose employment was compulsory. They referred to *The Batavier* (1), and *The Castor*. (2)

(1) 10 Jur. 19; 4 N. of C. 356.

(2) 6 L. T. (N.S.) 106.

*Dr. Deane, Q.C.*, and *Clarkson*, for the plaintiffs, contended that costs ought not to be given; on the ground that it was impossible they could tell before the trial what had been done on board the defendants' vessel.

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SIR R. PHILLIMORE, after stating the facts and adverting to the circumstance that the plaintiffs had produced as their witness the defendants' pilot, said,—Looking to all the circumstances of this case, and the present state of the law with respect to compulsory pilotage, I am of opinion that the defendants are entitled to their costs.

Proctor for plaintiffs: *H. G. Stokes*.

Proctors for defendants: *Pritchard & Sons*.

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 THE ROECLIFF.

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 May 11.

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*Practice—Release of Cargo—Freight.*

A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of the arrest a portion only of such cargo remained on board. The vessel and cargo belonged to the same owner:—

*Held*, on motion for release of the cargo remaining on board, that the freight due upon the whole cargo must be paid into court, before the portion on board at the time of the arrest could be released.

MOTION for release of cargo.

The *Roecliff* was arrested in a cause of collision. At the time of the collision the *Roecliff* had a cargo on board. At the time of the arrest only a portion of the cargo remained on board. The cargo and vessel belonged to the same owner. The freight due on the portion on board at the time of arrest was paid into court.

*Bayford*, in support of the motion, referred to *The Victor* (1) and *The Leo*. (2)

*Clarkson*, contra.

May 11. SIR R. PHILLIMORE. The question before the Court relates to an application made to it for a release of the cargo of the *Roecliff*. The cargo is not responsible for the damage, but was

(1) Lush. 72,

(2) Lush. 444,

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arrested in order that the freight due thereupon, which is liable for the damage, might be brought into court. This has been a usual proceeding in this court. I am now prayed to release the cargo from arrest, on the ground that the freight for which it has been arrested has been paid into court. This application is opposed on the ground that only a portion of the freight has been so paid in. The material facts appear to be as follows. [His Lordship here stated the facts of the case.] The question is whether the freight due upon the portion of the cargo which was arrested is alone responsible for the damage, or whether the Court ought to require that the freight upon the whole of the cargo be paid into court, before that portion of the cargo is released. Owing to the circumstance that the owner of the cargo and the ship are one—no freight has been paid on any part of the cargo. The question in this precise form has, I believe, never yet been brought before the Court for adjudication; the usual course having been to issue a monition against the holders of the freight to bring it into court. It is clear that the whole of the freight upon the cargo on board the vessel, at the time of the collision, was responsible for the damage. The accident of some of that cargo not being on board at the time of the arrest, cannot relieve it from that obligation. It is the duty of the Court, so far as its powers extend, to enforce that obligation. I shall not release the cargo until the whole freight is paid into court.

Proctors for owners of *Roecliff*: *Clarkson, Son, & Greenwell*.

Proctor for plaintiffs: *T. Cooper*.



## THE THETIS.

*Master's Authority—Salvage Services.*

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July 1.

The steamer *T.*, while on a voyage from Marseilles to London, fell in with the steamer *S.*, which had been disabled by an accident to her machinery. The master of the *T.* agreed to tow the *S.* to port for a sum agreed on. In endeavouring to do so the *T.* negligently came into collision with the *S.* and sunk her.

The policy of insurance upon the *T.* and her bills of lading provided that she might assist and tow vessels in all situations. The master of the *T.* had never received any instructions from the owners as to performing salvage services:—

*Held*, that the master of the *T.* was acting within the scope of his general authority as master in endeavouring to tow the *S.* to port, and that the owners of the *T.* were consequently liable for the damage caused by his negligence in so doing.

*Semble*, that even if there had been no clause in the policy of insurance or bills of lading as to salvage services, the master would nevertheless have been acting within his general authority as master in rendering salvage services to the *S.*

CAUSE of damage in respect of a collision between two screw steamers, the *Sardis* and the *Thetis*, which happened about eighty miles to the S.E. of Cape St. Vincent.

The cause was heard before the Court and Trinity Masters, when the following facts appeared.

The *Sardis* was a screw steamer of 1634 net and 1800 gross tonnage. She had a crew of forty-one hands, and was bound from Smyrna to London. In the prosecution of her voyage she left Gibraltar on the 29th of December. When she had passed the Gut, and was about seventy miles north-west of Cape Trafalgar, an accident happened to her engines, which prevented them from working, and she began to drift, and she was hove to. Between eleven and twelve the next morning the *Thetis* was descried, and signalled to take the *Sardis* in tow. The *Thetis* was a screw steamer of 548 tons with engines of ninety horse power, carrying merchandize and passengers from Marseilles to London. She was navigated by a crew of twenty-one hands. She came up with the *Sardis*, and her captain came on board, and eventually it was agreed that the *Thetis* should tow the *Sardis* back to Gibraltar for 400*l.*

While the *Thetis* was endeavouring to commence to tow the *Sardis* a collision occurred between the two vessels, by which the *Sardis* was so much damaged that she soon afterwards sunk.

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The Trinity Masters were of opinion that the *Sardis* was not to blame for the collision, and that the collision was caused by the unskilful and unseamanlike manœuvring of the *Thetis*. The Court accordingly was of opinion that the *Thetis*, by careless and unseamanlike conduct, caused this collision, and pronounced the *Thetis* solely to blame. The policy of insurance on the *Thetis* contained a clause giving her leave to tow and assist vessels in all situations, and the bills of lading provided that she "might assist and tow vessels in all situations." The owners of the *Thetis* had neither authorized nor forbidden the master to render salvage services.

The question was then raised whether the master of the *Thetis*, in attempting to assist the *Sardis*, was acting within the scope of his authority as the agent of her owners so as to render them liable for his negligence.

*Milward, Q.C.*, and *Clarkson*, for the owners of the *Thetis*.

*Dr. Deane, Q.C.*, and *Cohen*, for the owners of the *Sardis*.

The following cases were referred to:—*Croft v. Alison* (1); *Hawtayne v. Bourne* (2); *Mitchell v. Crassweller* (3); *Seymour v. Greenwood* (4); *Limpus v. London General Omnibus Company* (5); *Tobin v. The Queen* (6); *Wilson v. Rankin* (7); *The Queen v. Stephens* (8); *Howard v. Sheward* (9); *The Robert Pow* (10); *The Julia*. (11)

*Cur. adv. vult.*

July 1. SIR R. PHILLIMORE. It has been contended that I ought not to condemn the owners of the *Thetis*, or render them liable for the damages of this collision, because the master of the *Thetis* was not acting within the scope of his authority as their agent or in the course of his employment as their servant in attempting to assist the *Sardis*, which attempt led to the collision in question.

In support of this contention a number of cases were cited to

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| (1) 4 B. & A. 590.                     | (6) 16 C. B. (N.S.) 310; 33 L. J., |
| (2) 7 M. & W. at p. 598.               | (C.P.) 199, <i>17/11/16 MS 629</i> |
| (3) 13 C. B. 237; 22 L. J. (C.P.)      | (7) Law Rep. 1 Q. B. 162.          |
| 100. <i>17/11/16</i>                   | (8) Law Rep. 1 Q. B. 702.          |
| (4) 7 H. & N. 355; 32 L. J. (Ex.) 189. | (9) Law Rep. 2 C. P. 148.          |
| (5) 1 H. & C. at pp. 534, 535; 32      | (10) Brow. & Lush, 99.             |
| L. J. (Ex.) 34.                        | (11) Lush. 224. ✓                  |

the Court from reports of the decisions at common law. The last case upon this subject of responsibility of the principal for the act of his agent is that of *Barwick v. English Joint Stock Bank*. (1) Mr. Justice Willes delivered the judgment of the Exchequer Chamber in this case, and observed as follows:—"The general rule is that the master is answerable for every such wrong of the servant or agent, as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases; it has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

It has been argued that upon the principle of these cases the owner of the *Thetis* was not responsible for the wrongful act of the master, inasmuch as the latter had no authority, express or implied, to perform a salvage service. I was referred to the case of *The Rising Sun*, decided in the District Court of Maine (2); I have perused the judgment in that case, but have not been able to extract from it any assistance for the decision of the point of law before me. According to the evidence of the master in the case before me, he had received no instructions from his owners with respect to performing salvage service, and the owner deposed, "I have neither authorized nor forbidden my ships to render salvage service—it has never come before me."

(1) Law Rep. 2 Ex, at p. 265.

(2) Ware, 378.

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Now, it is to be remembered in the first place, that the master of a ship is not an ordinary agent, but one of a special kind sui generis; secondly, that the rendering of salvage services is an obligation required by the dictates of humanity, by the principles of public policy, and by the general interests of society—and has been recognized as such by the practice and jurisprudence of every civilized state. “It is the duty,” Lord Stowell says in the case of *The Waterloo* (1), “of all ships to give succour to others in distress; none but a freebooter would withhold it.” It has been urged upon me that the act of the master in this case could not have been within the scope of his commission, and was not for the benefit of the owners, because a deviation for the purpose of rendering salvage service to property would, upon general principles, avoid a policy of insurance, but that is an undecided and very doubtful proposition of English law, and certainly one to which I cannot give my assent. It was, at all events, pronounced by the Privy Council in 1866 to be an undecided point of law: *The True Blue*. (2) See also Maclachlan on Shipping, 363. I am aware that the American courts appear to have made a distinction between a deviation for the purpose of saving life and for that of saving property; it is, perhaps, not quite so certain, however, as generally supposed, that such a distinction has been finally established (2 Parson’s Mar. Law. Bk. 2, c. 8, p. 298; 3 Kent’s Comm. 313-14, and note).

If it be necessary that I should express my opinion whether upon general principles of law, the owner of the *Thetis* was responsible for the act of the master in causing this collision, I should express it in the affirmative. I think, having regard to the principles of law respecting salvage service, the master, though not directly authorized to do the particular act was, to borrow Mr. Justice Willes’s expression, “the agent in his place to do that class of acts,” and that by the negligent performance of an act of this class the damage which is the subject of this suit was caused; and, therefore, that the owner “must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.” But, in truth, when I find in the policy of insurance appertaining to this ship, a clause giving her leave to tow and assist vessels in all situations,

(1) 2 Dodson’s Ad. Rep. at p. 437.

(2) Law Rep. 1 P. C. C. 254-5.



and that it is provided in the bills of lading that she may "assist and tow vessels in all situations," I entertain little doubt that it is not competent to the owner to deny that the attempt to salve the *Thetis* was within the scope of the authority, and in the course of the employment of the master.

There is one further argument which I must not omit to notice, namely, that the master of the *Sardis* took upon himself the risk of employing the *Thetis*, and thereby exempted the owner from responsibility for the act of his agent, and for this proposition the case of *Fletcher v. Rylands* in the Exchequer Chamber (1), was cited as an authority, but I do not think that the circumstances of this case support the proposition of fact to which this law is to be applied. The *Thetis* must have known her own power, and she adopted her own measures for the performance of the service which, as the evidence shews, she voluntarily and deliberately undertook; she was perfectly aware of the size, character, and condition of the vessel; which she agreed to tow. No concealment or deception was practised. The damage was by no means in the category of a necessary or inevitable accident, but was caused, as I have already stated, by the negligence and unskilfulness with which the *Thetis* was navigated. I therefore pronounce the *Thetis* alone to blame for this collision.

Proctors for plaintiffs: *Clarkson & Co.*

Proctor for defendants: *Cooper.*

(1) Law Rep. 1 Ex. 265. *12 June 1856* 603.

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## THE GANGES.

July 16.

*Salvage—Agreement—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182**—Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 18.*

By s. 182 of 17 & 18 Vict. c. 104, it is enacted that "every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative." By s. 18 of 25 & 26 Vict. c. 63, this section "does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship":—

*Held*, that these sections do not fetter the discretion of the Court upon the subject of these agreements, but that their effect is to render such agreements not illegal and to place them on the same footing on which they stood before any legislation on the subject.

The plaintiff was temporary master of a steam tug in the place of B., and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The steam tug belonged to a company whose business it was to render towage and salvage services to vessels in distress. The seamen employed by the company were paid, according to a special agreement, certain fixed wages and a fixed rate of poundage on all towage and salvage money earned by the tug. The plaintiff knew that B. was employed under this agreement. The plaintiff claimed salvage remuneration independently of the agreement:—

*Held*, that the agreement, as it did not appear to be inequitable, was valid, and the plaintiff was bound by it, and therefore could not maintain his claim for salvage.

SUIT by the master of a steam tug for apportionment of salvage against the owners of two steam tugs. The circumstances of the case are fully stated in the judgment.

*Butt, Q.C., and Pritchard*, for the plaintiffs.

*Dr. Deane, Q.C., and Clarkson*, for the defendants.

SIR R. PHILLIMORE. This is an application to the Court on behalf of a single salvor for salvage remuneration. He was the temporary master of a steam tug called the *Sailor*, which rendered salvage services to a large steamer called the *Ganges*, which was in distress near the Harbrough Sands. He institutes his suit for apportionment of salvage against the owners of the steam tugs *Sailor* and *Pilot*, who were also salvors of the said vessel. The *Sailor* is a steam tug of twenty-five tons, and thirty-two horse-

power; she belongs to the "Great Yarmouth Standard Steam Tug Company;" she was manned on this occasion by a crew of three men, that is, by the plaintiff as master, an engineer, and a stoker; during the progress of the services in question she took on board two extra men. The services of the *Sailor* began at 1 o'clock P.M. of Friday, the 23rd of October, last year, and lasted till 4 o'clock P.M. of the Sunday following. It is admitted that these services were performed with much difficulty and some risk, and that by means of the said services and those of the other salvors, the *Ganges* was rescued from a position of great danger. The other salvors were the tugs *Pilot* and *Andrew Woodhouse*, and the Caistor life-boat.

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A sum of 2000*l.* was paid by the owners of the *Ganges* and her cargo, which was accepted as covering the claims of all the salvors. It is not necessary to go through the calculations upon which the amount due to the *Sailor* was fixed at 410*l.* 10*s.*; I must take that to be the sum distributable to the owners, master and crew of that tug; and of this sum 3*l.* 15*s.* was set apart for the portion to be paid to the salvor who has instituted the present suit; it was tendered to him, and he refused it. This sum would certainly, upon the general principles upon which salvage is distributed, be a very inadequate remuneration to the plaintiff, who was the temporary master of the *Sailor*. This particular allotment however is defended upon the ground of special custom and agreement. It appears from the defendants' pleadings, and from the evidence, that the Great Yarmouth Steam Tug Company carries on a business with the steam tugs the *Sailor* and the *Pilot*, and two other tugs; this business consists in great part "of rendering salvage services and towage services in the nature of salvage services to vessels in distress; and their tugs are expressly provided and constantly kept up at a great cost with a view to rendering such services, and but for the remuneration obtained for such services they would be unable to work their tugs at a profit."

The secretary of the company, Mr. Freeman, was examined; he explained that they had a business of towing and salvage, that there were many cases of towage of distressed vessels for which sums under 10*l.* were received, that the simple towage remuneration would not enable the company to keep up their tugs; the

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masters and crews are allowed by the company 5 per cent. on all towage and upon salvage where the sum earned was over 5*l.*; besides this they had their wages—and, when away from port, 1*s.* 6*d.* a day for victualling money. During the fishing season there was a towage of fourteen or fifteen boats a day; each tug had a crew of three men and one large rope on board; the company had carried on this business since 1862, during which time only one man had demurred to the system of poundage. It appeared however that the tugs were laid up for nine months in the year. It appears also from the evidence that the remuneration is the same to each of the crew, however different the degree of merit; and also that the tug or tugs not employed in the service share equally with those that are employed.

The plaintiff deposed that he had been master in the service of the defendants for about thirty months, that he was perfectly aware of the custom of poundage, and had always acquiesced in it; that when he took Butterfield's place as temporary master of the *Sailor*, he was aware that this custom prevailed, and he gave no notice to the owners that he was not serving as master upon the ordinary terms of poundage remuneration; he admitted that Butterfield had taken his place, when he, the plaintiff, was in the service of the company, on the same terms.

Some evidence has also been offered to the Court tending to prove that the arrangement in question does operate on the whole beneficially for the seamen who are employed by this company. Upon the general question, as to whether any agreement of this kind shall be maintained, I have had considerable doubt. On the one hand, there is a tendency to set aside the principles on which salvage remuneration is awarded, to remove the stimulus which that principle affords to individual exertion, and to reduce the various degrees of merit which may arise to one dead level. On the other hand I think I must infer from the evidence before me that one principal object of salvage remuneration is advanced by this agreement, namely, the having in readiness vessels peculiarly fitted for the preservation of life and property, and crews accustomed to the navigation of them.

I have considered various cases which have been decided by my predecessors on this subject:—*The Margaret*, referred to in



*The Zephyr* (1); and *The Beulah*. (2) In *The Beulah* (3) the words of the Judge are remarkable:—"I cannot consider myself bound by any arrangement that the owners might make with the mariners, because I apprehend that the latter are entitled to the judgment of this Court as to what it thinks equitable, and as to the principles which ought to govern each particular case. At the same time I must confess that I should be exceedingly reluctant indeed to disturb an arrangement hitherto carried on with satisfaction to all parties, and which, as far as I find, has been productive of nothing but an harmonious result. I cannot lay out of my consideration an important fact, which makes a material difference in a case of this kind, namely, that it has been sworn, and not contradicted, that the persons on board these steamers receive their wages whether in sickness or in health, and they are therefore in a very different situation, in many important respects, from ordinary mariners. I wish it to be understood that if, unfortunately, any such case as this should occur again, I undoubtedly shall make an exception to any arrangement which has been formed between the parties, not only where there has been great risk, but also where there has been extraordinary labour; but these are the only cases in which I shall do it, where there is no great risk or extraordinary labour I shall think it my duty to adhere to the arrangements with respect to quantum which have hitherto been acted upon by the parties."

These cases were decided before the passing of the Merchant Shipping Act, to the clauses of which I will now refer. The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182, enacted that "every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative."

*The Enchantress* (4) was decided after the passing of this act. In that case the learned Judge said (5): "The act of parliament says that every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative, and the Court has held, and

(1) 2 Hagg. at p. 48, note.

(2) 2 Notes of Cases, 61.

(3) 2 Notes of Cases, at p. 64.

(4) Lush. 93.

(5) Lush. at p. 96.

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must hold, that not only all agreements barring salvage are wholly inoperative, but that agreements limiting the proportion of salvage-money are to be maintained only so far as they are really equitable. I am of opinion that the alleged agreement in this case is open to the objection that it is inequitable, and that, even if made, it is not binding upon the plaintiffs."

Since this decision, the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), has provided as follows, by s. 18:— [The learned Judge read the section.]

I do not construe these statutes as in any way fettering the discretion of the Court upon the subject of these agreements; the joint effect of the two clauses is simply to render such agreements not illegal, and to place them on the same footing on which they stood before any legislation on the subject. This, I am glad to find, was the opinion of my predecessor in the last case to which I shall refer, *The Pride of Canada* (1); the circumstances of it were very similar to those of the present case.

Having regard to these circumstances, especially to the facts that the salvor in this case was perfectly aware that he was acting for a person bound by this arrangement, which I cannot pronounce upon the evidence before me to be inequitable, that no extraordinary exertion or peril accompanied the salvage service in this case, which was mainly effected by the vessel, I think I shall act in accordance with the principles which have guided my predecessors in this Court in pronouncing for the validity of the agreement in the case now before me.

I have considered the argument which has been addressed to me with respect of the apportionment of salvage to this individual under the assumption of the agreement, and I have come to the conclusion that I ought not to interfere with that matter.

I pronounce therefore against the prayer of the plaintiff, but I shall give no costs.

Proctor for plaintiff: *Longden.*

Proctor for defendants: *Skipwith.*

(1) Brow. & Lush. 208.

## THE NEPOTER.

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July 27.

*Bill of Lading—The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6—Right of Consignee to Sue—Passing of Property—Liability for Leakage.*

The consignees named in a bill of lading are entitled under s. 6 of the Admiralty Court Act, 1861, to sue for negligence in the carriage of the goods, or for a breach of the contract contained in the bill of lading, although the property in the goods has not passed to them.

A bill of lading for a quantity of sugar contained a memorandum in the margin that the shipowner was "not liable for leakage." The sugar, in consequence of improper stowing, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat:—

*Held*, that this was not damage by leakage within the meaning of the memorandum.

DAMAGE to cargo. Suit instituted by Messrs. Cottam, Morten, & Co., the consignees of various parcels of sugar which formed part of the cargo of the Norwegian barque, the *Nepoter*, against the barque and her owners. The bills of lading for the sugar were not endorsed to the plaintiffs, but the plaintiffs were named in the bills of lading as the persons to whom the goods were to be delivered. The bills of lading were in the usual form, and contained a memorandum that the owners were to be "not liable for leakage."

The suit was brought under s. 6 of the Admiralty Court Act, 1861, on the ground that the goods were not delivered "in good order and well-conditioned," and that such non-delivery was "caused by the negligence or misconduct of the master and crew, or was otherwise a breach of contract or duty on the part of the master and of the defendants." (1)

The defendants, the owners of the vessel, alleged in their answer: First, that the plaintiffs were not consignees of the goods to whom the property in the goods had passed: Secondly, that the goods were delivered in proper state and condition: Thirdly, that the non-delivery of the goods in proper state and condition was

(1) 24 Vict. c. 10, s. 6, enacts that "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any

ship for damage done to the goods, or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless," &c., &c.

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 THE NEPOTER, duty on the part of the master or of the defendants: Fourthly,  
 that the damage was occasioned by leakage for which the defend-  
 ants were not liable.

*R. G. Williams* appeared for the plaintiffs.

*Butt, Q.C.*, and *Cohen*, for the defendants.

July 27, 1869. SIR R. PHILLIMORE. With respect to the first defence, which is one of law, the validity of it must depend upon the true construction of s. 6 of the Admiralty Court Act, 1861, and upon the practice of this court independently of that Act. Upon both grounds I am of opinion that this defence fails. I adhere to the construction of the statute which I expressed in *The Figlia Maggiore* (1), and I think that these plaintiffs have a right under s. 6 of 24 Vict. c. 10, to sue the defendants both for negligence and for breach of contract as "consignees of goods named in the bills of lading," even though the property did not pass; in other words, that it is not necessary to import into the Admiralty Court Act from the Bills of Lading Act (18 & 19 Vict. c. 111) the words "to whom the property in the goods shall pass." I am aware that this construction differs from that which Dr. Lushington put upon the statute in his judgment in *The St. Cloud* (2), and that I am taking a step beyond that which I took in the *Figlia Maggiore* (1); but after much reflection I have come to the conclusion that the Admiralty Court Act intended to give every consignee or assignee of a bill of lading a capacity to sue in this court for damage done to the goods mentioned in the bill. I think this, which is certainly the obvious construction of the plain words of the statute, is consistent with the intention of the legislature to protect the absent owners; it must often happen, as in the present case, that an immediate proceeding, and one which would allow no time for communication with the owner, must be necessary for his protection. The evidence of damage caused by fermentation or the like process might, and not unfrequently would, be lost in consequence of the delay which the necessity of such a communication would create; and I agree with Dr. Lush-

(1) Ante, pp. 106, 110.

(2) Brow. & Lush. 4, 16.



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ington in his general view of the objects of this statute in the *St. Cloud* (1): "The general intention of the legislature cannot be doubtful. The statute is remedial. The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal, and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the Common Law tribunals could not afford effectual redress."

By the 7th section of the same statute (24 Vict. c. 10), it has been enacted that "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship;" this Court (confirmed by the Judicial Committee of the Privy Council) has, in the case of *The Beta* (2), put the largest construction on the words "any claim"—a fact which must be considered in weighing the reasons assigned by Dr. Lushington in his judgment in *The St. Cloud*. (3) The reasons which appear most to have weighed with my learned predecessor for transferring the words of the Bills of Lading Act into the Admiralty Court Act, which he said "at first sight is rather a strong proposition," were as follows (3): "A nude assignee would, if the owners of the ship were out of the country, have a right of action in the Admiralty Court, and in that alone; but if the owners of the ship were in this country, such nude assignee would have no right of action, either in the Admiralty Court or in one of the Courts of Common Law. Such a consequence is so inconsistent with reason that I cannot believe it was the intention of the legislature." But it appears to me, as perhaps it would to the learned judge if it had been brought a second time to his consideration, that this consequence is really

(1) Brow. &amp; Lush. at p. 14.

(2) Law Rep. 2 P. C. C. 447.

(3) Brow. &amp; Lush. at p. 18.

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 THE NEPOTER. not unreasonable; because, if the owners of the ship were in this country, the owner of the goods would know where and how to bring his action against them; whereas in the case of the owners being abroad, unless his agent could at once arrest the ship, no action could be brought at all, either in rem or in personam, in this country, although the cargo was discharged here; and all the evidence of the damage must necessarily be in this country. Another reason for putting this construction upon this statute is, that it would be in harmony with the usual practice of this court, which has always put aside technical objections, as to the parties who may institute or defend a suit, and allowed any person who has an interest to appear for the purpose of defending that interest, as in the common case of a bottomry bondholder defending a suit for wages. But if the construction of the statute in *The St. Cloud* be right, and my present construction wrong, I adhere to my opinion expressed in *The Piglia Maggiore* (1), that the assignee would have a persona standi on the ground of negligence or breach of duty, if not on the ground of the breach of contract; for I think that I must assign a distinct force to each of these grounds. I think it right also to add that, after careful perusal of the judgment in the case of *Short v. Simpson* (2), I incline to the opinion that a property did pass sufficient to entitle the consignee to sue in this court under these bills of lading in the particular circumstances of this case. It is true that bills were not drawn upon the cargo, but there was an arrangement between the consignor and the consignee according to which the consignee accepted bills drawn upon his firm by the consignor, and credited him with the proceeds of the goods sold from time to time. There was an account current between them; and at the time of the institution of this suit the consignor was considerably in debt to the consignee. And the mention of this fact leads me to notice another criterion of a species of property having passed to the plaintiffs in this case. An indorsee of a bill of lading, to whom a general balance is due, and a consignee of goods, who is entrusted to sell them and has a general balance against the consignor, have an insurable interest in such goods. (3) This is the position of

(1) Ante, p. 106.

(2) Law Rep. 1 C. P. 248.

(3) 1 Arnould, 3rd ed. pp. 66-70.

the plaintiffs in this case; and therefore I think a sufficient property vested in the plaintiffs to satisfy the Bills of Lading Act; and moreover they would have such an interest in the goods as would, according to all analogy derived from the practice of this court, entitle them to sue.

Now, with respect to the defence on the facts of the case. The cargo in this vessel was the usual, if not the invariable, cargo from Jamaica, namely, a cargo of sugar; and it is proved to my satisfaction, after due consideration of the evidence on the one side and the other, that the portion of the cargo which belonged to the plaintiffs—and it is to be observed that it was only a small portion of the cargo—was shipped in proper order, and after proper precautions, in the port of Salt River, Jamaica; and the condition in which the cargo generally was discharged at the port of London appears to have been as follows:—The upper portion was in a very good condition, as was also the lower portion, with the exception of the casks on the ground tier, which were consigned to the plaintiffs. On this tier there was an accumulation of drainage in the nature of molasses, part liquid part encrusted, to the extent of two feet or rather more, up the hogsheads; some of the casks were full, some about half full, some about one-third, and some entirely empty. Not any casks on the bottom tier were absolutely uninjured, according to the evidence of Mr. Jack who superintended the discharge of the cargo, and who appeared to me a perfectly credible witness. The fact, therefore, that the goods were not discharged in the like good order and condition in which they were laden appears to me to be proved.

The next defence is, that this damage was not occasioned by negligence or breach of duty on the part of the master. This defence involves two considerations: First, whether any precautions ought to have been taken to prevent the accumulation of drainage: Secondly, if so, whether such precautions were taken.

It appears from the evidence that all sugar cargoes drain, and that this sugar cargo drained, I think, rather less than the average. It appears that the drainage came out, for the most part, if not entirely, from the head of the cask. It is admitted that this drainage should find its way through the ceiling in some way or other into the hold, and also that the drainage of this cargo did not

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so find its way. If this drainage does not escape, the lowest tier of casks must, as in the present case, receive injury. I have already adverted to the fact that these casks were imbedded more than half way up in molasses; and to this fact there can be no doubt, in my opinion, that the damage done to this cargo was owing.

The master frankly admitted that this was the first cargo of sugar which he had ever carried; that there were four holes, about  $1\frac{1}{4}$  inches in diameter, bored close to the after-part of the pumps, for the purpose only of draining the water when the hold was washed. Other witnesses also speak to these holes. The result of the evidence appears to me to be that they were quite insufficient to afford the necessary means of egress for the liquid stuff to reach the pumps; and that other means ought to have been provided, whether by a greater number and a larger size of holes, or by keeping the timber boards open by means of wedges, a precaution which appears to be generally taken before the vessel sails. It is clear that the skin of the ceiling of the *Nepoter* was too tight to allow the stuff to escape without some such precautions. I am therefore of opinion that precautions ought to have been taken by the master, and were not taken, which would have prevented the damage in this case.

The last defence remains to be considered, namely, that this drainage falls within the excepted perils mentioned in the bills of lading, that is, "not liable for leakage." But this defence appears to me also untenable. For it is not the leakage, properly speaking, which has done this injury to the cargo; but the accumulation of drainage upon the floor to such an extent that the casks were half-way immersed in it; and it was this mischief, which, by keeping out the air, caused the sugar to heat, and thereby, as a natural consequence, produced the emptiness of the casks. The circumstances, therefore, of this case render the judgment of the Privy Council in *The Helene* (1) inapplicable.

Upon the whole, I am satisfied that the plaintiffs have established their case; and I must make the usual order of reference to the registrar to ascertain the amount of the damage; and I must accompany this sentence with costs.

Proctors for plaintiffs: *Clarkson, Son, & Greenwell.*

Proctors for defendants: *Deacon, Son, & Rogers.*



## THE GREAT PACIFIC.

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Nov. 17.*Bottomry Bond—Construction—Constructive Total Loss—Average—Salvage.*

A vessel bound from a foreign port to Great Britain, put into an intermediate port for repairs, where her master properly executed a bottomry bond on ship and freight, which contained a provision for payment "in case of the loss of the ship," of "such an average as by custom shall have become due on the salvage, or if on the said voyage, the said ship shall be utterly lost, cast away, or destroyed," then that the bond should be void. In the course of her voyage the vessel suffered sea damage, and put into another port, where she was sold, being unworthy of repairs, and the proceeds, which were less than the amount of the bond, were paid into Court:—

*Held*, that the bondholder was entitled to the whole of the proceeds.

*Appd by PE 27C.576*  
CAUSE of bottomry instituted on behalf of the legal holders of a bottomry bond on the *Great Pacific* against the proceeds of the sale of the vessel.

The petition alleged that before the making of the bottomry bond hereinafter mentioned the *Great Pacific*, being on a voyage from Callao to the Chincha Islands, and thence to the United Kingdom, put into the port of Sydney for certain necessary repairs; that money being required for the purpose of such repairs, in order to enable the ship to proceed on her voyage, and her master being without funds, and being unable otherwise to obtain them, he was obliged to and did borrow from the plaintiffs the sum of 5037*l.* 13*s.* 5*d.* sterling on bottomry of the said ship and her freight; that by a bottomry bond of the 29th of March, 1867, the master of the *Great Pacific* hypothecated the ship and freight earned or to be earned on the voyage to the plaintiffs as security for 5037*l.* 13*s.* 5*d.*, and the agreed interest thereon at the rate of 45 per cent. for the voyage, amounting together to the sum of 7301*l.* 15*s.* 9*d.*; that the condition of the bond provides that if the ship shall complete her voyage, and if the owners of the said ship shall pay to the plaintiffs the 5037*l.* 13*s.* 5*d.*, together with interest thereon, within twelve hours after the ship's arrival at her port of discharge, or in case of the loss of the ship, such an average as by custom shall have become due on the salvage; or if on the voyage the ship shall be utterly lost, cast away, or destroyed, in consequence of fire, enemies, men of war, pirates, storm, or other

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unavoidable perils, damages, or casualties of the seas, rivers, and navigation, then the said bond shall be void and of no effect; that the said sum of £5037*l.* 13*s.* 5*d.* was duly applied to the purposes for which it was so borrowed by the said master, and by reason thereof the vessel was enabled to proceed on her voyage; that afterwards and in the course of her voyage the ship was caught in a hurricane and had to put into Valparaiso, where she was sold, being unworthy of repairs. The proceeds of the sale, amounting to the sum of 3628*l.* 8*s.*, have been brought into court in this suit.

A mortgagee of the ship intervened and pleaded, first, that nothing was due on the bottomry bond which was set out in the answer; secondly, that the plaintiffs were only entitled to an average on the sum of 3628*l.* 8*s.*, the amount of the proceeds of the sale of the ship.

The plaintiffs moved to reject this part of the answer.

Nov. 10, 1868. *Butt* and *Cohen* appeared for the plaintiffs.  
*J. C. Mathew*, and *Clarkson*, for the defendant.

*Cur. adv. vult.*

Nov. 17. SIR R. PHILLIMORE. This is a cause of bottomry instituted by the legal holders of the bottomry bond against a vessel called the *Great Pacific*, and against certain proceeds of the sale of the said vessel, amounting to 3628*l.* 8*s.*

The action was originally brought against William Baillie, the master of the vessel, but he has been dismissed by consent from the suit, and Thomas Stephens, the mortgagee of the vessel, has intervened, and the suit is now really in pœnam against the proceeds.

The *Great Pacific* being on a voyage from Calloa to the Chincha Islands, and thence to the United Kingdom, was obliged to put into the port of Sydney for certain necessary repairs, and while there the master borrowed 5037*l.* 13*s.* 5*d.* on bottomry of the ship and freight, at a maritime premium of 45 per cent. on the voyage, making a total of 7301*l.* 15*s.* 9*d.*

The ship in the course of her further voyage was caught in a hurricane and compelled to put into Valparaiso, where she was

sold by the master, it having been ascertained that the requisite repairs would exceed in amount the value of the ship. The sale realized 3628*l.* 8*s.*, the proceeds now in court, and the defendant contends in these circumstances, first, that nothing is due on the bottomry bond in question; secondly, that at all events the plaintiffs are only entitled to an average on the sum of 3628*l.* 8*s.*, the amount of the proceeds of the sale of the ship paid into court.

The questions which the Court has to decide are, whether by either or both of these averments a valid defence is set up against the holder of the bottomry bond, who claims to be paid the full amount of his loan. Practically, my decision upon these points is to determine the suit, subject to the usual reference to the registrar.

In this case there is no question as to the validity of the bond, and the freight has been wholly lost.

I will deal first with the first question, namely, that nothing is due on the bond, and it is necessary in this case, as in all cases of the same description, to look carefully at the terms of the instrument itself, although it has always been the practice, and is clearly the duty of the Court, to put a reasonable and liberal, and not a technical, construction upon them.

Applying this principle to the bond before me, I must observe that in it the words "5037*l.* 13*s.* 5*d.* sterling, which sum is to run at respondentia on the block and freight of the ship or vessel," are clearly inaccurate. Respondentia, properly speaking, applies only to the cargo, which is not included in this bottomry bond. The bond further contains the usual statement that "the *Great Pacific* and her freight are thus assigned over for the security of the respondentia taken up by the said William Baillie as aforesaid, and shall be delivered to no other use or purpose whatsoever until the payment of this bond is first made, with the premium that may become due thereon." The condition of the bond is, that the vessel shall with all reasonable speed duly prosecute and complete, without deviation, her voyage, "the perils, damages, casualties, and accidents of the seas, rivers, and navigation excepted;" and that within twelve hours of the safe arrival of the ship at the port of her destination the money due on the bond should be paid to the lender; and then follow these words, upon

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which the contention of the defendant has been mainly founded—  
“or in case of the loss of the said ship or vessel such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed,” then the bond was to be void and of no effect. An examination of the authorities and decided cases upon this subject satisfies me that, generally speaking, money advanced on a bottomry bond becomes due and payable to the lender, not only when the vessel arrives in safety at her port of destination, but whenever her voyage is ended at some intermediate place, as in this case, by the voluntary act of her master, the servant of her owner; and that under the category of voluntary acts must be included the sale of the vessel by him at an intermediate port, because the expense of her necessary repairs would exceed the reasonable value of the vessel herself, and where, as would appear in the present case, the master has exercised a wise discretion with reference to the interests of his absent owners. The cases on this point are collected in Parsons on Maritime Law, vol. ii., p. 13—23.

I will assume that in this case there was what is called a “constructive total loss” of the ship, which would have entitled her owners to recover from the underwriters the whole amount of her insurance, but there has not been that actual or absolute total loss which would discharge from his liability the borrower of money upon bottomry, inasmuch as the ship existed in specie at the time of her sale.

Such being the general law, can it be successfully contended that the words of the bond to which I have adverted prevent the application of the law to this case?

It has been pressed upon me that by these words a distinction was intended to be drawn between the loss and the utter loss of the vessel. That in the latter case the bond was to be entirely void and the borrower to take no interest whatever, and in the former case only an average of the salvage such as by custom might be due. That the amount obtained from the sale of the vessel represents the total salvage on which the lender, if he be entitled to anything, is entitled to an average. I may say in passing that it can hardly be said to have been seriously contended



that to this he was not entitled. I am unable to concede to this construction of the words in the bond.

It appears upon an examination of the old forms of bonds, copies of which are to be found in the early edition of Abbott on Shipping, and in the work of Westkitt (a complete Digest of the Laws of Insurance, edit. 1781, pp. 41, 48, and 58), which Mr. Cohen has been good enough to lend me, that a stipulation couched in these very words was of common occurrence, derived probably from the mercantile usages of Spain with respect to vessels trading with the Spanish West Indies, and that it referred to cases in which the ship had been so wrecked that portions of her alone remained, such as planks, spars, rigging, and the like, when to use the expression of Emerigon, chap. 17, sec. 2, vol. ii., p. 213, edit. 1827, "Les débris du navire naufragé existent mais le navire n'existe plus."

This provision with regard to salvage, in cases of bottomry, it may be observed, is to be found in the French Code de Commerce, article 327, "En cas de naufrage le paiement des sommes empruntées à la grosse est réduit à la valeur des effets sauvés et effectés au contrat, deduction faite des frais de sauvetage." It is not necessary that I should express an opinion whether, on the contingency of such a wreck, the lender would or would not be entitled to this kind of salvage by the common law merchant, or whether, in order that he should have this right, the insertion of these words was necessary. In my opinion they contemplate an event which has not happened in this case, and have no effect on the application of the law to the event which has happened, and which has rendered these proceeds, which represent the ship, liable to the claim of the bondholder, namely, the sale by the master of the ship at an intermediate port before she arrived at her port of destination, which in cases of bottomry like the present, the law holds to be equivalent to the safe arrival of the vessel at that port.

I pronounce, therefore, for the prayer of the bondholder, and direct the articles in question to be struck out of the answer.

Attorneys for plaintiffs: *Westall & Roberts.*

Attorneys for defendant: *Cotterill & Sons.*

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THE GREAT  
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April 30.

## [IN THE ARCHES COURT.]

RIPPIN AND WILSON *v.* BASTIN.

*Repairs of Church—Chancel—Construction—“Church”—5 Geo. 4, c. 36, s. 1—  
Loan by Commissioners of Public Works.*

2PC446 Section 1 of 5 Geo. 4, c. 36, enacts, that churchwardens and overseers of a parish may, with the consent of the vestry, of the bishop of the diocese, and of the incumbent, apply to the commissioners empowered to make advances on public works for a loan for “rebuilding, repairing, enlarging, or otherwise extending the accommodation of any church or chapel of such parish,” and the commissioners, on being satisfied that the required consent has been given, may advance the loan which is to be applied “for the purposes mentioned in such application,” and rates are to be made for the repayment of the loan.

A loan was made under 5 Geo. 4, c. 36, s. 1, for the purpose of repairing the church of H. All the formalities required by the Act were duly complied with before the loan was granted. A portion of the money was expended in repairing the chancel, and the rest in repairing the other portions of the church. Subsequently a rate was made in due form to repay the loan.

In a suit against a ratepayer for refusal to pay the rate the defendant alleged in his answer that it was the duty of the rector alone to repair the chancel; that the preliminary resolution of the vestry contemplated the application of a portion of the loan to the repair of the chancel; that a portion of the loan was expended in repairing the chancel; that the consent of the bishop, and the advance by the commissioners, were given and made respectively on the representation that the loan was wanted for purposes that did not include the repair of the chancel; and that, therefore, the rate was void:—

*Held*, that the word “church” in the above section included the chancel, and that, therefore, a portion of the loan might properly be expended in repairing the chancel.

*Held*, further, that even if the word “church” did not include the chancel, yet, as all the required formalities had been observed before the loan was granted, an improper expenditure of the loan could not affect the commissioners’ right to repayment; and that the rate, being duly made in form, was valid.

SUIT for subtraction of church rate made under 5 Geo. 4, c. 36. (1) The suit was brought by letters of request from the

(1) 5 Geo. 4, c. 36, s. 1, enacts, that it shall be lawful for the churchwardens and overseers of the poor of any parish in England or Wales, with the consent of the vestry, or where any parish shall be under the control of any select vestry or other select body, then with the consent of such select vestry or select body, and with the consent of the bishop of the diocese,

and of the incumbent of such parish, to make application to the commissioners empowered to make advances for public works for a loan of such sum as may be necessary for defraying the expense “of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish;” and the commissioners, if satisfied that the consent

Consistorial Court of Lincoln, and promoted by J. Rippin and B. Wilson, the churchwardens of the parish of Harmston, in the county of Lincoln, against J. Bastin, an inhabitant and ratepayer of that parish.

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The libel set out that in the year 1867 money was required for the purpose of restoring the parish church of Harmston, in the county of Lincoln; that, after the consent of the vestry, of the bishop, and the incumbent, had been duly obtained, application was made to the commissioners empowered to make advances for public works for a loan for repairing the church; that a loan was made by the commissioners; that the first instalment of this loan, together with interest, became due in the month of May, 1868; that a rate was duly made for payment of this instalment and the interest; that most of the ratepayers paid their quota towards it; but that the defendant refused to pay the sum for which he was assessed.

The responsive allegation on the part of the defendant alleged, that by law the duty of repairing the chancel of the church at Harmston lies on the rector only; that the preliminary resolution of the vestry, previous to the borrowing of the money from the commissioners, contemplated the application of the money so borrowed to the repair of the chancel as well as of the church; that a portion of the money so borrowed was, in fact, expended on the repair of the chancel, and that the consent of the bishop to such borrowing was given, and the advance by the commissioners was made, with the intention that the money should be expended on the church only.

April 23. The case came before the Court, on objection to the admissibility of this allegation.

*Prideaux, Q.C., and Dr. Middleton*, for the plaintiffs.

*Dr. Deane, Q.C., and Bayford*, for the defendant.

*Cur. adv. vult.*

required by the Act has been given, may make such loan "for the purposes aforesaid;" and the churchwardens and overseers of the poor of such parish may receive the sum so advanced, "and apply the same for the purposes

mentioned in such application;" and the Act then provides that rates are to be made for the repayment of such loan.

By s. 2, such rates are to be levied as church rates.

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RIFFIN  
v.  
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April 30. SIR R. PHILLIMORE [after stating the pleadings]:—

The defence set up is not that the resolutions were, in themselves, irregular, or that the proper proceedings with reference to the borrowing of the money from the commissioners, were not taken in manner prescribed by the law; the present case is therefore distinguishable from that of *White v. Steele*. (1) In that case the proper legal steps, which were conditions precedent to give validity to the loan of the commissioners, had not been taken; but in the case now before the Court all the preliminary proceedings required by the statute appear to have been regularly had.

The responsive plea sets up an unexpressed intention on the part of the vestry to expend part of the money borrowed on the repair of the chancel. This is a novel and objectionable mode of pleading. According to the practice of the Court, reformed and rendered more simple by the last rules, the principal facts on which the party propounding the plea intends to rely, ought to be pleaded: this requirement is not satisfied by an averment of an intention unaccompanied by a statement of some overt act or declaration, whence this intention can be inferred. The plea goes on to say that the bishop would not have consented to the loan, nor the commissioners have advanced their money, if he or they had been apprised that part of it was to be expended on the chancel; but no ground of fact is stated which can lead the Court to this conclusion.

The points really raised in this case are two. First, whether the word "church" in the Act of 5 Geo. 4, c. 36, includes "chancel." Second, whether, supposing it does not, a wrongful expenditure of the money advanced by the Commissioners posterior to such advance, can operate retro-actively so as to render void a resolution which at the time of its passing was legal and proper.

On the first point, the Court must consider the words of the Act. They are very large; they extend to all cases of "rebuilding, repairing, enlarging, or otherwise extending any church or chapel." It has been argued, that in legal language, the church does not commonly include the chancel; and that, as by the common law ecclesiastical, it is the duty of the rector to repair the chancel, and the duty of the parishioners to repair the body of the church, it would be an injustice both to the rector and to the parishioners to



construe this Act as extending to either party the burden of assisting the other in the performance of the common law duty separately binding upon each. It does not appear to the Court, however, that there is any theoretical injustice in this mutual arrangement of duties; while a safeguard against any practical injustice is furnished by requiring the preliminary consent of the bishop and of the incumbent, which term would, at least, include any spiritual rector.

There can be no doubt that, according to the ordinary interpretation, the word church would include chancel; and the statute, I think, uses the word church in the plain sense given it in common language. The very fact that the word chancel is not used in the act, furnishes an argument in favour of the more extended use of the word church. Great and obvious inconveniences might arise if the word church were shorn, upon technical grounds, of its full signification. It might happen that the nave or body of the church might be restored or enlarged while the chancel remained in a condition not only out of harmony with the repaired church, but in a condition which rendered the repaired portion insecure. I am, however, of opinion, that no argument can be drawn from the words of the 3rd section of the act, which, I think, relates to a different category of cases from that contained in the 1st and 2nd sections.

On the second point, the Court is of opinion that when all the steps required by the act have been duly taken, and the money has been advanced by the commissioners on the security of a legal resolution of the vestry, with the proper consents duly given, no subsequent expenditure of a part of the money advanced on an improper object, can by any retro-active effect invalidate the security of the commissioners. On the whole, I am of opinion, that the plea is, in its present shape, inadmissible; and I shall direct it to be generally reformed within a fortnight from this time; but I will give the defendant leave to appeal from this decree if he should think fit so to do.

Proctors for plaintiffs: *Deacon, Son, & Rogers.*

Proctors for defendant: *Clarkson, Son, & Greenwell.*

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RIPPIN  
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July 30.

## THE PANAMA.

*Bottomry Bond, Validity of—Notice to Owner.*

A vessel being in distress at Cuba, the master applied to B.'s agents there for an advance of money for necessary repairs. The agents, after telegraphing to B., who resided at Liverpool, received B.'s authority to make the advance on bottomry of the vessel, and this was done. B. was second mortgagee of the vessel, and knew at the time he authorized the advance that the owner was insolvent, and that he and the first mortgagee both resided in Liverpool; but before authorizing the advance he did not, nor did the master, communicate with either. The first mortgagee contested the validity of the bond:—

*Held*, that the bond was invalid; for that, under the particular circumstances of the case, B. ought to have communicated with the owner before authorizing his agents to enter into the bond.

*aff'd 13 M. & W. 197.*  
**BOTTOMRY.** Petition in objection to the registrar's report in a suit instituted by Charles Barron and Thomas Harrison, the holders of two bottomry bonds, against the vessel *Panama*. The owner did not appear, but the validity of the bonds was disputed by one Stuart, a mortgagee; and it was agreed by the plaintiffs and Stuart that the bonds should be referred to the registrar, assisted by merchants, "to report the amount due thereon, but without prejudice to the question as to their validity." The question as to the validity of the bonds was, however, raised before the registrar, and he reported that the bonds were invalid on the ground that the bondholder had not communicated with the owner, although he was in the same town, and might have conferred with him whenever he pleased, and was aware that the master had not communicated with him. [The circumstances under which the bonds were given will be found at length in the judgment of the Court, post, p. 391.] The registrar reported that all the charges were "quite proper;" that "the bottomry premium was not excessive;" and that "he was not aware that any of the items could have been struck out." The petition of appeal alleged the report to be erroneous, because the registrar had no power to decide upon the validity of the bonds, and because the facts did not warrant the report that the bonds were invalid. It was subsequently agreed between the parties that the Court should be asked to decide the question as to the validity of the bonds as if the question were

mooted before it for the first time, and that the remainder of the report should be accepted.

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July 20. *Butt, Q.C.*, and *Pritchard*, in objection to the report, referred to the *Bonaparte*. (1)

*Clarkson*, contra.

*Cur. adv. vult.*

July 30. SIR R. J. PHILLIMORE [after stating the facts as to the report]:—The first bond has been abandoned, and I have only to deal with the second bond, which is dated the 2nd of December, 1868. It was signed at Cardenas, in Cuba, and given to cover two sums respectively of 378*l.* 3*s.* and 250*l.*, and with a bottomry premium of 30 per cent. on the former sum, and amounts to the sum of 741*l.* 12*s.*, but this sum of 250*l.* has been withdrawn from the claim by the counsel for the bondholders on the ground that it was originally advanced on the security of the freight; so that the claim of the bondholders in this court is limited to the principal sum of 378*l.* 3*s.*, and the bottomry premium of 113*l.* 9*s.* The owner of the *Panama*, Mr. Fincham, does not dispute the validity of the bond, but he has been examined as a witness by the defendant. The bond was entered into by the master, who was his son-in-law. The owner is insolvent, and was so at the time when the bond was given. A first mortgagee, Mr. Stuart, appears to contest the validity of the bond. And it is important to observe that the bondholders held a second mortgage on the vessel. The bond does not affect the cargo, and according to the finding of the registrar, with which I agree, the expenses which the bond was given to cover were quite proper. The owner, as I have said, was insolvent, and the master had no credit, and the recourse to a bottomry bond appears to have been a matter of necessity. The time which it takes to write a letter from Cuba to Liverpool, and obtain an answer, is six weeks in the ordinary course of post. The master has not been produced as a witness by either party.

The facts which I have thus stated are not disputed. I will now consider more closely those which relate to the execution of the bond. On the 23rd of August, 1868, the *Panama* left Cardenas, and arrived at Trinidad de Cuba in September, and took on board

(1) 3 Wm. Rob. 298; 7 N. of C. supp. lv.

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THE PANAMA. a cargo of mahogany and cedar, the freight on which, it appears, would amount to 1100*l.* or 1200*l.* On the 12th of October, 1868, the *Panama* left Trinidad de Cuba for London, but having suffered injury from tempestuous weather, she put into Cardenas. She was surveyed on the 6th of November. The master applied to the agents of Messrs. Finlay & Co., which latter gentlemen were the agents of Messrs. Barron & Harrison, for an advance of money, which was refused. He then went to Havannah, and attempted to obtain the money from Messrs. Finlay & Co. themselves; he was again refused, and returned to Cardenas. It appears that he then applied to the owners of the cargo for money and, on their refusal, threatened to sell a portion of the cargo. The master had, for some time, been distrusted both by Barron and Harrison, and it should also seem by Fincham, the owner; and Messrs. Finlay & Co., taking alarm at this threat to sell a portion of the cargo, resolved to get rid of him; and, on the 24th day of November, telegraphed to Barron & Harrison in the following words:—" *Panama* wants two hundred pounds to clear, also hundred sixty claimed by Mantle for wages; are ready to advance all, but he must leave vessel to captain appointed by consul. See owner, answer." To this Messrs. Barron & Harrison answered, also by telegram, on the 25th of the same month:—" Do best for our interest, appoint new master, secure advance, bottomry." On receipt of this telegram, Messrs. Finlay & Co., with the assistance of the British consul at Havannah, removed the master, Captain Mantle, and put another master in his place; but before Captain Mantle left, they got him to sign the bottomry bond, which is the one in dispute in this case. At the time when Mr. Barron telegraphed back this answer, he was resident in Liverpool. Mr. Fincham, the owner, resided in that town, or close to it, and continually attended at an office in the town. Of this fact Mr. Barron was perfectly aware; he was also perfectly aware that Mr. Stuart was first mortgagee of the vessel, and resided in Liverpool. Mr. Barron had no communication whatever with the owner upon the subject of this bottomry bond; and the question arises, whether, in these circumstances, he had a right to instruct the master, through his agents, to bottomry the ship as a security for his, the bondholder's, advance of money. It is not necessary to assert, as a proposition of law, that in all cases the



bondholder, or even the master, must communicate with his owner before a bottomry bond be entered into; or that it is necessary that the bondholder should communicate with the first mortgagee. Neither of these propositions is required to sustain the judgment which I am about to pronounce, and which is confined to the particular facts and circumstances of this case. Having regard to them, I think there was a duty incumbent upon the bondholder of communicating with the owner before the bond was entered into, and that this duty was not taken away by the fact that the owner was insolvent—a point which was much pressed upon me by the counsel for the bondholder. For the owner might have thought it expedient to endeavour to raise the money, either through his creditors, or from the first mortgagee, who was close at hand, or from some other source; and I cannot lay out of my consideration the fact that by this bond the second mortgagee, who is the lender, does practically render the vessel liable to pay a premium of 30 per cent. before the first mortgagee can be satisfied.

I pronounce against the validity of this bond with costs.

Attorneys for plaintiffs: *Wright & Venn.*

Proctors for defendant: *Clarkson, Son, & Greenwell.*

#### THE DUERO.

July 31.

*Damage to Cargo—Negligence of Master and Crew—Bill of Lading—Excepted Perils.*

A cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading, which was not signed until after the cargo was stowed, but before the voyage commenced, contained a clause exempting the ship from liability to make good loss from, inter alia, “negligence or default of master or mariners, or others performing their duties”—

*Held*, that, assuming the shipowner to be (which, semble, he is not) in the category of a common carrier, the clause was not unreasonable; that the damage came within it, and that the shipowner was, therefore, not liable.

**DAMAGE to cargo.** The following facts were stated in the form of a special case. On or about the 10th of July, 1868, Messrs. Carey & Co., of Tarragona, in Spain, as agents for Hanson & Son, of No. 47, Botolph Lane, in the City of London, fruit merchants, the plaintiffs in this cause, delivered to Messrs. P. M. Tintare, of

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Barcelona, in Spain, the owners of the steamship *Duero*, 180 bags of Barcelona nuts, the property of the plaintiffs, to be carried from Tarragona to London on board the *Duero*, then lying in the port of Tarragona, upon the terms of the bill of lading for the same. [These terms are set out in the judgment of the Court, post p. 395.] The goods were, when shipped, in good order and condition. The steamship subsequently proceeded on her voyage to London, where she arrived about the 6th of August, 1868, when the goods were delivered to the plaintiffs in a damaged condition, such damaged condition having been occasioned by the negligence and default of the master and mariners of the vessel in and about stowing the goods on board of her. The question for the opinion of the Court on this special case was whether the defendants were protected from liability by the terms of the bill of lading. If the Court should be of opinion that the defendants were protected from liability, then judgment should be entered for the defendants, and the plaintiffs condemned in the costs of all the proceedings in this cause. If the Court should be of the contrary opinion, then the defendants should be condemned in such amount of damage as might be agreed to by the parties, or should be ascertained by the registrar and merchants in case the parties could not agree together, with the costs of all the proceedings in this cause.

At the hearing some difficulty arose on the construction of the terms of this agreement, and the following paragraph was added:—“Admitted by both parties, that in the ordinary course mate’s receipt was given for goods on shipment, and subsequently the bill of lading substituted for it; that the goods were stowed before the bill of lading given but after mate’s receipt, that damage occurred after delivery of the bill of lading, in the course of the voyage. The action is for damage occasioned by the facts stated in the case.”

July 24. *Butt*, Q.C., for the plaintiffs; *Cohen*, for the defendants.

The following authorities were referred to:—*Peck v. North Staffordshire Railway Company* (1); *Austin v. Manchester Railway Company* (2); *Carr v. Lancashire Railway Company* (3); *Penin-*

(1) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(2) 16 Q. B. 600.

(3) 7 Ex. 707.

*g/mc MS. 914*

*sular and Oriental Steam Navigation Company v. Shand* (1); *Grill v. General Iron Screw Colliery Company* (2); *Dixon v. Sadler* (3); Parsons on Shipping, vol. i. p. 216, and the cases there cited; *Kay v. Wheeler*. (4)

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*Cur. adv. vult.*

JULY 31. SIR R. J. PHILLIMORE. The true question appears to the Court to be in this case—what was the contract between the parties? Now, the contract between the parties was to deliver these nuts in proper condition. The bill of lading says 180 regular bags of hazel nuts were to be delivered at the port of London, with the usual exceptions, in good condition. It then says that “the vessel is not answerable for any discrepancy between the contents of the packages and description of the same in the bills of lading; the goods to be discharged from the ship twenty-four hours after she is ready to unload;” and, further, that “the shippers are to be accountable for any loss or damage which may arise from the contents of the packages being wrongly described,” and so on. The usual perils are excepted—“the act of God, the Queen’s enemies, pirates, or robbers;” and then there is this peculiar exception—“and the ship not being liable to make good loss from any of the causes above excepted.” The causes “above excepted” are the act of God, the Queen’s enemies, pirates, or robbers, restraint of princes or rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or from other goods by contact, sweating, leakage, or otherwise; barratry, negligence, or default of master, pilot, or mariners, or others performing their duties; vermin, jettison, and also accidents of navigation of every kind excepted: and the ship not being liable to make good loss from any of the causes above excepted. That was the contract. It has been contended that the mischief done to this peculiar cargo was occasioned by the stowing, though the damage, it is admitted in the case, occurred after the vessel was in the course of navigation; and it has also been urged, that this bill of lading being subsequent to the stowing, it could not relieve the shipowners from the obligations which they were under, as carriers, to repair the mischief done by improper stowage of the goods. It was not exactly contended that there were two contracts

(1) 3 Moo. P. C. C. (N.S.) 272.

(3) 5 M. &amp; W. 405.

(2) Law Rep. 3 C. P. 476.

(4) Law Rep. 2 C. P. 302.

(1) SC 11 Jan 25771

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in this case, but it was insisted that the bill of lading did not cover the injury arising from the stowage, which act of stowage took place before the bill of lading was granted. The conclusion at which I have arrived, is, that I have only to look at the bill of lading as the expression of the true contract existing between the parties, and to consider whether the delivery of these goods in a different condition from that in which they were originally placed on board does, or does not, fall within the excepted perils mentioned in that bill of lading. It has been contended amongst other objections for the plaintiffs, that this contract was in itself unlawful, inasmuch as it professed to provide against due care being bestowed by the carrier upon the goods which he undertook to convey. I must observe that it has not been proved to me that a shipowner is in the category of a common carrier, and that he is bound as a common carrier would be bound, under the liability of an action being brought against him, to carry goods generally; but, even if it were so, according to the principles of the decisions affecting this part of the case, it appears to me it is competent to the common carrier to exempt himself from liability. Assuming, for the sake of argument, that the shipowner was in the category of a common carrier, still it would be competent to him, under the authority of the decisions in *Phillips v. Clark* (1), and the *Peninsular and Oriental Steam Navigation Company v. Shand* (2), to have protected himself from liability by such a bill of lading as this—at all events, if not to have protected himself from his own personal negligence, still to have protected himself from the negligence of the servants whom he employed. It must also be observed, that it must be presumed that this bill of lading was accepted deliberately by the plaintiffs, though it was, of course, competent to them to have refused so to accept it. The contract does not appear to me in itself to have been unreasonable. I am not aware what the circumstances are relating to the carriage of these goods, but it is perfectly possible that, in return for the exemption from liability, there might have been a demand for less freight; and it is perfectly clear and well established, I think, by the argument of Mr. Cohen, that the consignor of these goods might protect himself by insuring against the liability which the shipowner declined, so

(1) 2 C. B. (N. S.) 156.

3 Jan MS 467

(2) 3 Moo. P. C. C. (N. S.) 272.

11 Jan MS 771



that, in fact, there would, practically speaking, be a transfer of liability from the shipowner to the underwriter. That the underwriter can insure against the negligence of the master is, I think, placed beyond doubt by the case of *Dixon v. Sadler*. (1) I merely refer to this case to show, what perhaps there is no dispute about, that it was quite competent to the consignor to have insured himself against the negligence of the master. It was suggested that this was a case in which, possibly, the Spanish law might be applicable, because it appeared that the goods were shipped and the contract was entered into at Tarragona, and it had not been shewn by the plaintiffs that this was a contract which it was lawful to enter into according to Spanish law, which was the *lex loci contractus*. But, in answer to that, I think it is enough to say, that if the defendants had that defence to make, it was their duty to have established it, like any other fact, by proper evidence. I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the forum in which the case is brought are bound to establish that difference by competent evidence, and no such evidence has been brought before me on the present occasion. I pronounce the defence to be sufficient, and the petition must be dismissed with costs, it having been established that the damage done to the goods came within the excepted perils of the bill of lading.

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Attorney for plaintiffs: *H. D. Ellis*.

Proctors for defendants: *Pritchard & Sons*.

(1) 5 M. & W. 405.



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- AMOUNT OF BAIL—Practice.—Repairs subsequent to Arrest—Value.** A wrong-doing vessel was arrested in a cause of collision, having been herself injured in the collision. She was then repaired, and her value was materially increased by the repairs:—*Held*, on motion for release of the vessel on bail, that she was only liable to the extent of her value at the time she was arrested, and that she ought to be released on bail to that amount being given. *THE ST. OLAF.* - 360
- ANSWER IN COLLISION SUIT — Pleading.]** Pleadings should be so framed as to assist not only the party in his statement of the case, but also the Court in investigating the truth between the litigants; the defendant in a collision cause cannot rely on a simple negative, but must state the circumstances relating to the collision. *THE WHY NOT.* - 265
- APPEAL FROM AWARD OF JUSTICES—Salvage** —17 & 18 Vict. c. 104, s. 464; 25 & 26 Vict. c. 63, s. 49—"Sum in Dispute"—*Fresh Evidence—Practice.* The provision in the 49th section of the 25 & 26 Vict. c. 63, extending the jurisdiction of the justices in salvage cases to all cases in which the value of the property saved does not exceed 1000*l.*, merely extends and applies the regulations in the 464th section of the 17 & 18 Vict. c. 104, respecting appeals for claims not exceeding 50*l.*, to cases in which the value of the ship and freight is under 1000*l.*; but does not make the appeal depend on the claim being for 50*l.* and upwards, and the value of the property saved being 1000*l.* and upwards. Salvors claimed before the justices 55*l.* under a written agreement, 5*l.* of which was admitted to be due to them:—*Held*, that the "sum in dispute" exceeded 50*l.* Circumstances considered under which the Judge of the Admiralty Court will exercise his discre-
- APPEAL FROM AWARD OF JUSTICES—contd.** tion as to the admission of fresh evidence on appeal from justices in salvage cases. *THE GENEROUS* - - - - 57
- ARBITRATION—"Damage done by any ship"** 24  
*See* "DAMAGE DONE BY ANY SHIP."
- ATTORNEY—Garnishee order—Lien for costs** 1,  
*See* GARNISHEE ORDER. 1, 2. [314]
- AUTHORITY—Master of vessel—Liability of owners** - - - - 88  
*See* NECESSARIES FOR SHIP.
- AVERAGE—Bottomry Bond—Construction** 381  
*See* BOTTOMRY BOND. 1.
- AWARD OF JUSTICES—Salvage—Appeal—"Sum in dispute"** - - - - 57  
*See* APPEAL FROM AWARD OF JUSTICES.
- BAIL—Amount—Repairs subsequent to arrest**  
*See* AMOUNT OF BAIL. [360]
- BELL RINGING—Criminal Suit—Consent of Incumbent—Pleading—Notice of Objection—Rules (1867) 7, 11.]** In a criminal suit promoted by the incumbent for ringing the church bells, it is not sufficient to allege that the ringing took place without the consent of the incumbent; it must be alleged to have been against his express wish.—When the admission of pleadings in the Court of Arches is objected to, the notice to be filed under Rules 7 and 11 must state the grounds of objection. *DAUNT v. CROCKER* - - - - 41
- BILL OF EXCHANGE—Master's lien—Disbursements** - - - - 65  
*See* MASTER'S LIEN.
- BILL OF LADING—Assignee—Right to sue** 106  
*See* GENERAL SHIP.
- **Consignee—Right to sue** - - - 375  
*See* RIGHT OF CONSIGNEE TO SUE.
- **Negligence of master—Excepted perils** 393  
*See* NEGLIGENCE OF MASTER.
- **Non-delivery of cargo—Right to sue** 273  
*See* NON-DELIVERY OF CARGO.
- BOND, BOTTOMRY:** *See* BOTTOMRY BOND.
- BOOK OF COMMON PRAYER—Rites and Ceremonies—Elevation of the Sacrament—Excessive**

**BOOK OF COMMON PRAYER—continued.**

*Kneeling — Incense — Mixed Chalice — Lighted Candles on Communion Table.*] The terms rite and ceremony as used in the prayer-book are terms of ecclesiastical and ritual art, and are to be construed with reference to their use in the works of writers on ritual unless they receive a different meaning from a comparison of other passages or parts in the prayer-book or statute in which they are found. There is a legal distinction between a rite and a ceremony; a rite consists in services expressed in words; a ceremony in gestures or acts preceding, accompanying, or following the utterance of those words. The elevation of the sacrament of the Lord's Supper accompanied by kneeling at times not prescribed by the rubrics, the use of incense during the celebration of the eucharist, the mixing of water with wine at the time of the administration of the Lord's Supper, the use of lighted candles upon the holy table, are in law ceremonies, and belong to the category of ceremonies designated "mutable." The criterion of the legality of such ceremonies is in their conformity with primitive and catholic use, and not in their antagonism to Rome. The mere fact of their identity with the ceremonies in use before the Reformation is not sufficient ground from which to deduce their unlawfulness, nor does the fact that a practice is novel prove that it is unlawful. Things neither ordered nor prohibited expressly or by implication in the prayer-book are within the domain of the bishop of the diocese within which they occur, to deal with by monition. Therefore, where a clerk in holy orders was charged with excessive kneeling (though not for the purpose of adoration) during the prayer of consecration:—*Held*, that as the rubric gives no precise directions as to kneeling at that time, the charge was one which ought not to have formed the subject of a criminal prosecution, but ought to have been referred to the bishop in order that he might exercise his discretion thereupon. It is unlawful for a clerk in holy orders to elevate the paten and cup above his head after consecration during the celebration of the holy communion. To bring in incense at the beginning or during the celebration, and remove it at the close of the celebration of the eucharist, is a distinct ceremony, additional and not even indirectly incident to the ceremonies ordered by the prayer-book: and is, therefore, illegal. It is illegal to mix water with the wine during the celebration of the eucharist; but *quære*, whether it is illegal to administer to the communicants wine with which a little water has been previously mixed. The lawfulness of placing two lights upon the holy table is established by the injunctions of Edward VI. (1547). It is, therefore, lawful to place two lighted candles on the holy table during the time of the holy communion, "for the signification that Christ is the very true light of the world." MARTIN *v.* MACKONCHIE. FLAMANK *v.* SIMPSON - - - - - 116

**BOTTOMRY BOND** — *Construction — Constructive Total Loss—Average—Salvage.*] A vessel bound from a foreign port to Great Britain, put into an intermediate port for repairs, where her master properly executed a bottomry bond on ship and freight, which contained a provision for payment

**BOTTOMRY BOND—continued.**

"in case of the loss of the ship," of "such an average as by custom shall have become due on the salvage, or if on the said voyage, the said ship shall be utterly lost, cast away, or destroyed," then that the bond should be void. In the course of her voyage the vessel suffered sea damage, and put into another port, where she was sold, being unworthy of repairs, and the proceeds, which were less than the amount of the bond, were paid into Court:—*Held*, that the bondholder was entitled to the whole of the proceeds. THE GREAT PACIFIC.

[381

2. — *Duty of Master to communicate with Owner of Cargo before hypothecating.*] The *Lizzie* sailed from Minatitlan in January, 1866, with a cargo of mahogany and cedar, for the United Kingdom. Having suffered sea damage, she put into Key West, Feb. 27, and there properly underwent some necessary repairs which detained her until May 21. The master, not being able to raise money on personal security to defray the expenses of the repairs, gave a bottomry bond, dated the 19th of May, on the ship, freight, and cargo.—The master, before hypothecating, did not communicate with the owner or consignees of the cargo by reason of the great delay and uncertainty in the transmission of letters from Key West at that time. The vessel sailed on the 21st of May, and arrived at her port of destination on the 2nd of July.—A suit having been instituted against the vessel, her freight, and cargo, by the holders of the bottomry bond, the validity of which was contested by the consignees of the cargo:—*Held*, that under the circumstances, the master was not bound to communicate with the consignees before hypothecating, and that the bond was therefore binding upon the cargo. THE LIZZIE - 254

3. — *Master and Part Owner—Bond on Ship, Freight, and Cargo—Suit by Master for Wages—Priority—17 & 18 Vict. c. 104, s. 191.*] Where a master being also part owner of a vessel, had bound himself by a bottomry bond on ship, freight, and cargo:—*Held*, that the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder.—In such a suit by the master, the Court will not, under s. 191 of the Merchant Shipping Act, 1854, entertain a counter claim by the owner of the cargo. THE DARING - - 260

4. — *Ship, Freight, and Cargo—Validity of where given to meet Expenses already incurred—Duty of Master to Communicate with Owners of Cargo—Advance of Freight—Loan on Freight.*] It is the duty of the master before resorting to bottomry to communicate, or to endeavour to communicate, with the owners of the cargo as well as with the owners of the ship, if, in the circumstances, it be feasible.—Where a master fails to obtain funds from the owner to pay for repairs which the necessities of the ship compel him to order, he is warranted in raising money on bottomry of ship, freight, and cargo for that purpose from persons other than those who had supplied such repairs.—In the case of a bottomry bond for money already supplied without any previous agreement, it is to be presumed, in the absence of all evidence, that the foreign lender made his advances in contemplation of bottomry security; and this presumption



**BOTTOMRY BOND**—*continued.*

is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand.—The question whether money advanced is to be considered a loan or an advance of freight, must principally depend upon what appears upon the face of the instrument. **THE KARNAK** 289

5. — *Validity—Notice to Owner.*] A vessel being in distress at Cuba, the master applied to B.'s agents there for an advance of money for necessary repairs. The agents, after telegraphing to B., who resided at Liverpool, received B.'s authority to make the advance on bottomry of the vessel, and this was done. B. was second mortgagee of the vessel, and knew at the time he authorized the advance that the owner was insolvent, and that he and the first mortgagee both resided in Liverpool; but before authorizing the advance he did not, nor did the master, communicate with either. The first mortgagee contested the validity of the bond:—*Held*, that the bond was invalid; for that, under the particular circumstances of the case, B. ought to have communicated with the owner before authorizing his agents to enter into the bond. **THE PANAMA** - - - - - 390

**CAMPBELL'S ACT:** See **LORD CAMPBELL'S ACT.**

**CARGO**—Release—Freight—Practice - 363  
See **RELEASE OF CARGO.**

**CASE**—*Burder v. O'Neill* (9 Jur. (N.S.) 1109) dissented from - - - - - 281  
See **CHURCH DISCIPLINE ACT. 1.**

**CEREMONIES**—Book of Common Prayer - 116  
See **BOOK OF COMMON PRAYER.**

**CHANCEL**—Repairs—Construction—5 Geo. 4, c. 36, s. 1 "Church" - - - - - 386  
See **REPAIRS OF CHURCH.**

**CHARTERER**—Master's order for necessaries—Liability of owner - - - - - 88  
See **NECESSARIES FOR SHIP.**

**CHARTERPARTY**—Bill of lading—Right of assignee to sue - - - - - 106  
See **GENERAL SHIP.**

**CHURCH**—Two churches in one benefice—Divine service - - - - - 247  
See **TWO CHURCHES IN ONE BENEFICE.**

**CHURCH DISCIPLINE ACT**—*Criminal Suit—Evidence of Defendant*—14 & 15 Vict. c. 99, ss. 2, 3.] In a criminal suit against a clergyman under the Church Discipline Act (3 & 4 Vict. c. 86), the defendant is, since 14 & 15 Vict. c. 99, ss. 1 and 2, competent and compellable to give evidence. *Burder v. O'Neill* (9 Jur. (N.S.) 1109), dissented from. **THE BISHOP OF NORWICH v. PEARSE** [281

2. — (3 & 4 Vict. c. 86)—*Letters of Request—Discretion of the Court to accept or refuse in case of alleged Heresy.*] The right of the Court of Arches to refuse letters of request until proper grounds were assigned why they should be accepted, which existed previously to the passing of the Church Discipline Act, has not been taken away by that statute.—The Court of Arches has therefore a right to exercise its discretion, and may refuse to accept letters of request in a matter of heresy, unless some reason is stated why it should accept them. **SHEPARD v. BENNETT.** [335

**CHURCHYARD**—*Removal of Human Remains and Earth to adjoining Field—Monition to Restore—Field not in possession of Defendant—Contempt—Practice.*] In a suit promoted by one parishioner against another for having without lawful authority caused human bones and portions of the soil to be removed from a churchyard to a field belonging to the defendant, the Court of Arches decreed that the defendant had offended against the laws ecclesiastical, and issued a monition to him to replace in the burial ground before a certain day, the bones and earth so removed. The defendant failed to comply with the order, alleging that he was unable to do so by reason that the field in which the bones and earth had been placed was no longer in his occupation or possession:—*Held*, that his conduct amounted to contempt of Court, and that, unless he obeyed the monition within six days, and certified that he had done so, the Court would pronounce him in contempt, and signify the contempt to the Court of Chancery. **ADLAM v. COLTHURST** - - - - - 30

**COLLISION**—Foreign waters—Compulsory pilotage—Conflict of laws - - - - - 3

See **COLLISION IN FOREIGN WATERS. 1.**  
— Foreign waters—*Lis alibi pendens*—Discretion of Court - - - - - 356

See **COLLISION IN FOREIGN WATERS. 2.**  
— "Person in charge"—Compulsory pilotage  
See **"PERSON IN CHARGE."** [354

— Salvage - - - - - 53  
See **SALVAGE AFTER COLLISION.**

— Vessel under way—Coloured lights—Anchor down - - - - - 350  
See **VESSEL UNDER WAY.**

**COLLISION IN FOREIGN WATERS**—*British and Foreign Vessel—Compulsory Pilotage—Pleading.*] The plaintiffs, owners of a foreign vessel, claimed damages for a collision between their vessel and an English ship in Belgian waters. The defendants, the owners of the English ship, pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred:—*Held*, that the plaintiffs were entitled to plead in reply, that, by the same laws, the owner of the wrong-doing vessel, although compelled to take a pilot on board, continued liable for the damages. The expediency of the law of compulsory pilotage, so far as it exempts the owner of the wrong-doing vessel from all liability, considered and questioned. **THE HALLEY** - - - - - 3

2. — *Lis alibi pendens—Discretion of Admiralty Court to entertain Suit.*] In a cause of collision between two foreign vessels in the Bosphorus, with respect to which suits had been instituted in the Ottoman court:—*Held*, that if the evidence established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were instituted in rem or in personam, the Court would suspend proceedings, or put the party to his election as to which Court he would have recourse to. **THE MAIL IVO** - - - - - 356

**COLOURED LIGHTS**—Vessel under way—Collision—Anchor down - - - - - 350  
See **VESSEL UNDER WAY.**

**COMMUNION TABLE**—Candles—Book of Common Prayer - - - - - 116  
See **BOOK OF COMMON PRAYER.**

- COMPULSORY PILOTAGE**—Collision in foreign waters—Conflict of laws - - - 3  
*See COLLISION IN FOREIGN WATERS.* 1.  
 — Costs—Practice - - - 362  
*See DAMAGE CAUSED BY PILOT.*  
 — Liability of shipowner - - - 97  
*See LIABILITY OF SHIPOWNER.*  
 — “Passengers,” 17 & 18 Vict. c. 104, ss. 303, 354 - - - 102  
*See “PASSENGERS.”*  
 — “Person in charge” - - - 354  
*See “PERSON IN CHARGE.”*
- CONFLICT OF LAWS**—Collision in foreign waters—Compulsory pilotage - - 3  
*See COLLISION IN FOREIGN WATERS.* 1.
- CONSTRUCTION**—Bill of lading—Excepted perils—Negligence - - - 393  
*See NEGLIGENCE OF MASTER.*  
 — Bill of lading—“Not liable for leakage” 375  
*See RIGHT OF CONSIGNEE TO SUE.*  
 — Bottomry bond—Total loss - - 381  
*See BOTTOMRY BOND.* 1.  
 — “Church,” 5 Geo. 4, c. 36, s. 1 - 386  
*See REPAIRS OF CHURCH.*
- CONSTRUCTIVE TOTAL LOSS**—Bottomry bond—Construction - - - 381  
*See BOTTOMRY BOND.* 1.
- CONTEMPT OF COURT**—Churchyard - 30  
*See CHURCHYARD.*
- CONTRACT TO GIVE UP SALVAGE**—*Agreement—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182—Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 18.]* By s. 182 of 17 & 18 Vict. c. 104, it is enacted that “every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.” By s. 18 of 25 & 26 Vict. c. 63, this section “does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship” :—*Held*, that these sections do not fetter the discretion of the Court upon the subject of these agreements, but that their effect is to render such agreements not illegal and to place them on the same footing on which they stood before any legislation on the subject.—The plaintiff was temporary master of a steam tug in the place of B., and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The steam tug belonged to a company whose business it was to render towage and salvage services to vessels in distress. The seamen employed by the company were paid, according to a special agreement, certain fixed wages and a fixed rate of poundage on all towage and salvage money earned by the tug. The plaintiff knew that B. was employed under this agreement. The plaintiff claimed salvage remuneration independently of the agreement :—*Held*, that the agreement, as it did not appear to be inequitable, was valid, and the plaintiff was bound by it, and therefore could not maintain his claim for salvage. *THE GANGES* - - - 270
- COSTS**—Damage caused by pilot—Practice 362  
*See DAMAGE CAUSED BY PILOT.*  
 — Lien—Attorney—Proctor—Garnishee 1,314  
*See GARNISHEE ORDER.* 1, 2.
- COSTS OF SALVAGE SUIT**—*Jurisdiction*—25 & 26 Vict. c. 63; 31 & 32 Vict. c. 71, s. 9—*Damages.*] A salvaged vessel was valued by a Receiver of wreck at 746*l.* on the 3rd of December. On the 8th the salvors instituted a suit in the sum of 2500*l.*; on the 18th they applied for an appraisal of the vessel; on the 14th of January following they gave notice that they proceeded no further in the suit :—*Held*, that the salvor must have been aware within a short time of taking out the appraisal that the value fixed by the Receiver was substantially correct, and that they must therefore be condemned in costs, and in damages from the 22nd of December to the 14th of January. *THE MARGARET JANE* - - - 345
- CRIMINAL SUIT**—Bell-ringing - - 41  
*See BELL-RINGING.*  
 — Church Discipline Act—Evidence - 281  
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- CUSTOM OF PORT**—Bill of lading—Non-delivery of cargo - - - 273  
*See NON-DELIVERY OF CARGO.*
- DAMAGE CAUSED BY PILOT**—*Costs—Practice—Compulsory Employment—Pleading.*] In a cause of damage by collision, it was pleaded and proved by the defendants, who admitted that their vessel was the wrong-doer, that the collision was caused by the fault of their pilot, whose employment was compulsory.—The Court condemned the plaintiffs in costs. *THE ROYAL CHARTER* - - - 362
- “DAMAGE DONE BY ANY SHIP”**—*Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7—Cause of Damage for Personal Injury against a Ship—Arbitration.*] By the 7th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), the Court of Admiralty has jurisdiction to entertain a cause of damage for personal injuries done by a ship. A diver while engaged in diving in the river Mersey, was caught by the paddle-wheel of a steamer and suffered considerable injury, for which he brought an action against the owners, which was referred to arbitration. By the agreement of reference, all the rights of the plaintiff were reserved in case the award of the arbitrator should not be performed. The arbitrator awarded compensation, but the defendants never paid. The plaintiff then instituted a cause of damage against the ship. On motion to dismiss the petition :—*Held*, first, that the Court had jurisdiction to entertain the suit : Secondly, that the plaintiff, by submitting to arbitration, had not debarred himself from proceeding in rem in the Admiralty Court. *THE SYLPH* - 24
- DAMAGE DONE BY SHIP TO BREAKWATER**—*Respective Duties of Master and Dockmaster.*] By the regulations relating to Falmouth harbour, “masters and persons in charge of vessels are to cast off and remove them whenever required, and in the event of neglect or refusal to do so, they will be removed by the dockmaster. Vessels are to strike their yards and masts, if required.” The master of a vessel which had been moored at the eastern pier was desired by the dockmaster to re-

**DAMAGE DONE BY SHIP TO BREAKWATER—**  
*continued.*

move her to the western pier, and to strike his top-gallant masts, &c. On the master's refusal to obey the order (he having left the vessel with only three persons on board), the dockmaster removed her to the western pier, where during a gale she broke from her moorings and did considerable damage to the wharf:—*Held*, that by the regulations the dockmaster had a discretion to exercise for the welfare of all ships entering the harbour; and that the master was bound to obey the order and assist in the removal of his ship, even though, if the interests of the ship alone were to be considered, such removal was injudicious.—That it was the duty of the master to have kept a sufficient crew on board to protect his ship against ordinary perils.—*Held*, further, that, as a matter of fact, the damage was caused by the negligence of the master, and his refusal to obey the orders of the dockmaster; and, consequently, that the vessel was liable for such damage. **THE EXCELSIOR - 268**

**DAMAGE TO CARGO**—Bill of lading—Right of assignee to sue - - - - - **106**  
*See GENERAL SHIP.*

— Negligence of master—Bill of lading - **393**  
*See NEGLIGENCE OF MASTER.*

**DAMAGES**—Salvage—Costs - - - - - **345**  
*See COSTS OF SALVAGE SUIT.*

**DISBURSEMENTS**—Master's lien - - - - - **65**  
*See MASTER'S LIEN.*

**DISCRETION OF COURT**—Letters of request—Church Discipline Act - - - - - **335**  
*See CHURCH DISCIPLINE ACT. 2.*

— *Lis alibi pendens* - - - - - **356**  
*See COLLISION IN FOREIGN WATERS. 2.*

**DOCKMASTER**—Damage done by ship to break-water - - - - - **268**  
*See DAMAGE DONE BY SHIP TO BREAK-WATER.*

**ELEVATION OF THE SACRAMENT**—Book of Common Prayer - - - - - **116**  
*See BOOK OF COMMON PRAYER.*

**EVIDENCE**—Church discipline—Evidence of defendant - - - - - **281**  
*See CHURCH DISCIPLINE ACT. 1.*

— Onus of proof—Damage to cargo - **106**  
*See GENERAL SHIP.*

— Salvage—Appeal from award of justices **57**  
*See APPEAL FROM AWARD OF JUSTICES.*

**FOREIGN SHIP**—Suit for wages - - - - - **44**  
*See SUIT FOR WAGES.*

**FREIGHT**—Advances—Loan—Bottomry bond *See BOTTOMRY BOND. 4.* **[289]**

— Release of Cargo—Practice - - - - - **363**  
*See RELEASE OF CARGO.*

**GARNISHEE ORDER**—*Attorney's Lien for Costs—23 & 24 Vict. c. 127, ss. 28, 29, 30.*] The plaintiff having obtained a decree for payment by the defendant of a sum of money and costs, the defendant paid part of the sum to certain judgment creditors of the plaintiff under the authority of two garnishee orders. The plaintiff's attorneys had a lien for their costs at the time the garnishee

**GARNISHEE ORDER—continued.**

orders were made; but no notice had been given to them previous to the application for the garnishee orders, nor was the existence of their lien mentioned to the judge who made the order:—*Held*, that the defendant ought to have caused notice to be given to the attorneys, or ought to have apprised the judge of the existence of the lien before the orders were finally made, and that the payment under the garnishee orders was not a satisfaction of the judgment of the Court. **THE LEADER - - - - - 314**

2. — *Proctor's Lien for Costs—Priority.*] A proctor's lien on a fund in Court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the holder of the garnishee order. **THE JEFF DAVIS - - - 1**

**GENERAL SHIP**—*Right of Assignee of Bill of Lading to sue—Charterparty—18 & 19 Vict. c. 111, s. 1; 24 Vict. c. 10, s. 6—Damage to Cargo—Onus probandi—Improper Stowage of Oilcake and Tobacco.*] The plaintiffs were assignees for valuable consideration of bills of lading for 1000 barrels of oilcake shipped on board the *Figlia Maggiore*, at New York, and which the master had agreed "to deliver in like good order and condition at the port of London." The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oilcake was stowed with hogsheads of tobacco, oaken staves being placed between them. A suit having been brought by the plaintiffs against the shipowner for damage suffered by the oilcake on the voyage:—*Held*, that as the vessel had been put up as a general ship, and as the plaintiffs had no knowledge of the charterparty, the owner was the proper person to be sued: That the property in the oilcake had so vested in the plaintiffs as to entitle them to sue for breach of contract under s. 6 of 24 Vict. c. 10, construed with s. 1 of 18 & 19 Vict. c. 111, and that, in any case, they were entitled to sue under the former section on the ground of negligence: That the onus of proving negligence lay on the plaintiffs: That the mode of stowage of the oilcake and tobacco was unknown to the plaintiffs, and that the damage, however caused, was occasioned by the negligence or misconduct as well as by the breach of contract, on the part of the defendant and his servants. **THE FIGLIA MAGGIORE - - - 106**

**HYPOTHECATION**: *See BOTTOMRY BOND.*

**INCENSE**—Book of Common Prayer - **116**  
*See BOOK OF COMMON PRAYER.*

**INCUMBENT**—Duty to perform Divine service **[247]**  
*See TWO CHURCHES IN ONE BENEFICE.*

**INTERROGATORIES**—*Practice—Cause of Possession*] The Court of Admiralty will allow interrogatories to be administered rather in accordance with the practice of the Courts of Equity than of Common Law; and the principle by which the Court will be governed is, that the interrogatories should be such as tend *bonâ fide* to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the Court has to decide.—On objection by the defendant to interrogatories tendered



**INTERROGATORIES—continued.**

by the plaintiffs in a cause of possession, that his answers to them might subject him to penalties under the Foreign Enlistment Act :—*Held*, that the interrogatories should be administered, but that if the defendant stated upon his oath his belief that an answer to any particular interrogatory would subject him to such penalties, he should not be compelled to answer it. *THE MARY OR ALEXANDRA* - - - - 319

**JURISDICTION OF ADMIRALTY COURT—**Lord Campbell's Act - - - 325  
See LORD CAMPBELL'S ACT.

**JUSTICES—**Award—Salvage appeal—"Sum in dispute" - - - 57  
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**KNEELING—**Excess—Book of Common Prayer  
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**LEAKAGE—**Bill of lading—Construction 375  
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**LETTERS OF REQUEST—**Church Discipline Act—Discretion of Court - - - 335  
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**LEX LOCI—**Collision—Foreign waters - 3  
See COLLISION IN FOREIGN WATERS. 1.

**LIABILITY—**Shipowner - - - 97  
See LIABILITY OF SHIPOWNER.

— Shipowner—Master's order for necessities  
See NECESSARIES FOR SHIP. [88]

**LIABILITY OF SHIPOWNER—***Suit by Bailees of Barge—Compulsory Pilotage—17 & 18 Vict. c. 104, s. 388—Practice.* The owners of a wrong-doing vessel having, by compulsion of law, a pilot on board, held not to be exempt, under the 388th section of the Merchant Shipping Act, 1854, from liability for damage where a neglect of duty on the part of the master conduced to the collision. *The Iona* (Law Rep. 1 P. C. C. 426) applied. In a cause of collision instituted by the bailees of a barge against a steamship :—*Held*, that the plaintiffs were competent to sue in rem in the Admiralty Court; but in order to protect the defendants from the possibility of another suit by other parties on the same subject, the Court directed that the money awarded as compensation for the damage should not be paid until it should be satisfactorily established that such payment would release the defendants from all claims by the owners of the barge in respect of the collision. *THE MINNA* 97

**LIEN—**Maritime—Sale of vessel abroad - 330  
See SALE OF VESSEL ABROAD.

**LIEN FOR COSTS—**Attorney—Proctor—Fund in court - - - - - 1, 314  
See GARNISHEE ORDER. 1, 2.

**LIGHTED CANDLES—**Communion table—Book of Common Prayer - - - 116  
See BOOK OF COMMON PRAYER.

**LIS ALIBI PENDENS—**Collision in foreign waters—Discretion of Court - - - 356  
See COLLISION IN FOREIGN WATERS. 2.

**LOAN ON FREIGHT—**Bottomry bond - 289  
See BOTTOMRY BOND. 4.

**LORD CAMPBELL'S ACT** (9 & 10 Vict. c. 93)—*Jurisdiction of Admiralty Court—Admiralty Court Act, 1861* (24 Vict. c. 10), s. 7—*Damages for Personal*

**LORD CAMPBELL'S ACT—continued.**

*Injury.*] In a suit to recover damages by the personal representative of a person killed in a collision between two vessels :—*Held*, although not without doubt, that the Court had jurisdiction under Lord Campbell's Act, and the Admiralty Court Act, 1861, s. 7, to entertain the suit. *THE GULDFAXE* - - - - 325

**MARITIME LIEN—**Sale of vessel abroad 330  
See SALE OF VESSEL ABROAD.

**MASTER OF VESSEL—**Authority - 365  
See MASTER'S AUTHORITY.

— Damage done by ship to breakwater - 268  
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— Lien—Wages - - - - 65  
See MASTER'S LIEN.

— Negligence—Bill of lading - - 393  
See NEGLIGENCE OF MASTER.

— Order for necessities—Liability of owners  
See NECESSARIES FOR SHIP. [88]

**MASTER'S AUTHORITY—***Salvage Services.*] The steamer *T.*, while on a voyage from Marseilles to London, fell in with the steamer *S.*, which had been disabled by an accident to her machinery. The master of the *T.* agreed to tow the *S.* to port for a sum agreed on. In endeavouring to do so the *T.* negligently came into collision with the *S.* and sunk her.—The policy of insurance upon the *T.* and her bills of lading provided that she might assist and tow vessels in all situations. The master of the *T.* had never received any instructions from the owners as to performing salvage services :—*Held*, that the master of the *T.* was acting within the scope of his general authority as master in endeavouring to tow the *S.* to port, and that the owners of the *T.* were consequently liable for the damage caused by his negligence in so doing.—*Seemle*, that even if there had been no clause in the policy of insurance or bills of lading as to salvage services, the master would nevertheless have been acting within his general authority as master in rendering salvage service to the *S.* *THE THETIS* - - - - 365

**MASTER'S LIEN—***Right of Master also part Owner to Payment of Wages and Disbursements out of Freight—Mortgagees in Possession—24 Vict. c. 10, s. 10; "disbursements made by him;" Tobacco and Slops for Seamen; Items unpaid; Bill of Exchange—Practice.*] The master's maritime lien on the freight for his wages and disbursements in priority to the claims of the mortgagees is not affected by the fact of his being also part owner of the vessel. Disbursements made by the master include all proper expenditure made by him upon the ship, whether the particular articles be obtained by immediate or promised payment; therefore, liabilities incurred by him for articles expended for the benefit of the ship are to be considered as disbursements, and will be allowed where the Court has a fund in its custody legally liable for all necessities. In a suit by a master, who was also part owner, against ship and freight for wages and disbursements, the Court confirmed the registrar's report allowing the master's claim, in priority to the mortgagees in possession, for his wages and the following disbursements, viz. :—1. For tobacco



**MASTER'S LIEN—continued.**

and slops supplied to seamen, who afterwards deserted, on the ground that these being a part of seamen's wages, the master was entitled to be reimbursed for them, notwithstanding the fact that he might have made a small profit in supplying them; 2. For certain items which had not been paid, but which the registrar allowed, with a recommendation that no order for the payment thereof be made until the master deposited in the registry vouchers for the payment, or gave satisfactory evidence that the accounts had been paid; 3. For a bill of exchange drawn by the master, of the dishonour of which he had received no notice—and for which it was contended he was therefore no longer liable—on the ground, that as the whole principle of notice of dishonour is founded upon the notion of benefiting the drawer, and as in this case the drawer had not only not been injured by the absence of notice, but had taken no such objection as a defence, it was not competent to the defendants (mortgagees in possession representing the acceptor) to set up an objection on the ground of want of notice and to contend that the drawer was no longer liable on the bill. *THE FERONIA* - - - - - 65

**MASTER'S ORDER—Necessaries for ship—Liability of owners** - - - - - 88  
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**MERCHANT SHIPPING ACT, 1854, s. 182** 370  
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**MERCHANT SHIPPING ACT, 1862, s. 18** 370  
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**MIXED CHALICE—Book of Common Prayer**  
See BOOK OF COMMON PRAYER. [116]

**MONITION TO RESTORE—Churchyard** - 30  
See CHURCHYARD.

**MORTGAGEE—Possession—Practice** - 65  
See MASTER'S LIEN.

**NECESSARIES FOR SHIP—Master's Order—Liability of Owners—Charterer.**] The liability of the owner of a vessel to pay for repairs and equipments ordered by the master depends, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessities. The master's contracts cannot bind the owner, unless authority to bind the owner has been actually given to him; or unless the owner has, by word or deed, held out the master as his master, and thereby induced the vendor to supply the necessities upon the credit of the owner. The owners of a vessel entered into an agreement and charterparty, by which it was provided (inter alia) that the master, officers and crew, should be appointed by the owners, be under their control, and be dismissed by them, but that their wages should be paid by the charterer: it was also provided that the master should act as supervisor of the repairs and fittings of the ship. An action having been brought for necessities supplied to the ship while under this charter, by the master's order, who stated in his evidence that he considered himself as acting for and as the servant of both owners and charterer:—*Held*, that the owners had held out the master as their master, and that they were therefore liable for the debt. *THE GREAT EASTERN* - - - 88

**NEGLIGENCE—Damage to cargo—Evidence—Onus of proof** - - - - - 106  
See GENERAL SHIP.

—Master of vessel - - - - - 393  
See NEGLIGENCE OF MASTER.

—Practice—Particulars - - - - - 346  
See PARTICULARS OF NEGLIGENCE.

**NEGLIGENCE OF MASTER—Damage to Cargo—Bill of Lading—Excepted Perils.**] A cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading, which was not signed until after the cargo was stowed, but before the voyage, contained a clause exempting the ship from liability to make good loss from, inter alia, "negligence or default of master or mariners, or others performing their duties":—*Held*, that, assuming the shipowner to be (which, *semble*, he is not) in the category of a common carrier, the clause was not unreasonable; that the damage came within it, and that the shipowner was, therefore, not liable. *THE DUERO* - - - - - 393

**NON-DELIVERY OF CARGO—Bill of Lading—Right to Sue—Usual Place of Discharge—Custom of Port.**] The plaintiffs were indorsees of the bill of lading of a cargo which, according to the charterparty which contained a reference to the bill of lading, was to be unloaded at S., "at the usual place of discharge, and according to the custom of the port." The plaintiffs had agreed to sell the cargo to B. & Co., but the purchase-money had not been paid, nor had the bill of lading been indorsed to B. and Co. On the arrival of the vessel at S., the master put into the South Dock, when the plaintiffs ordered him to remove her to the Gill Dock, which the master refused to do until he had been paid the expenses incurred by entering the South Dock. Both docks were usual places of delivery for similar cargoes. In a suit for breach of contract for non-delivery of the cargo:—*Held*, first, that the plaintiffs were entitled to sue in this court under the Admiralty Court Act (24 Vict. c. 10), s. 6, when construed with the Bills of Lading Act (18 & 19 Vict. c. 111).—Secondly, that, in default of a custom to the contrary being proved, the master was not bound to lie in the river waiting for instructions, and was justified in mooring in the South Dock, but that having received directions to deliver his cargo in the Gill Dock, he was bound to obey them. *THE FELIX* - - - - - 273

**NOTICE OF OBJECTION—Criminal suit—Bellingringing** - - - - - 41  
See BELL-RINGING.

**NOTICE TO OWNER—Bottomry bond** - 390  
See BOTTOMRY BOND. 5.

**ONUS PROBANDI—Damage to cargo** - 106  
See GENERAL SHIP.

**ORDER—Garnishee—Lien for costs** - 1, 314  
See GARNISHEE ORDER. 1, 2.

**PARTICULARS OF NEGLIGENCE—Damage to Cargo—Pleading.**] In a cause of damage to cargo, the petition alleged that certain parcels of oil-cake were not delivered in good order and condition according to the terms of the bills of lading; and that the damages were the consequences of breaches of the contracts in the bills of lading, or

**PARTICULARS OF NEGLIGENCE**—*continued.*

that they were occasioned by negligence or breach of duty on the part of the master or crew:—*Held*, on motion by the defendants to order the plaintiffs to give particulars of the allegations, that they were not bound to set out the particular acts or the character of the negligence which caused the damage. *THE FREEDOM* - - - 346

**PASSENGERS**—*Collision—Compulsory Pilotage*—17 & 18 *Vict. c. 104, ss. 303, 354.*] The payment of a fare is necessary to constitute a passenger within the meaning of the 354th section of the Merchant Shipping Act, 1854, which imposes upon a "ship carrying passengers" the obligation of taking a pilot on board. Where a wrong-doing vessel in charge of a licensed pilot had on board at the time of the collision two persons whom the captain had taken as visitors, but who subsequently paid for their passage:—*Held*, that the owners were not exempt from liability by reason of their having a pilot on board at the time of the collision. *THE LION* - - - 102

"**PERSON IN CHARGE**"—*Collision—25 & 26 Vict. c. 63, s. 33—Compulsory Pilot.*] By 25 & 26 *Vict. c. 63, s. 33*, in case of collision between two ships, it is the duty of "the person in charge" of each ship to render assistance to the other, and in case he fails to do so without reasonable excuse the collision shall, in absence of proof to the contrary, be deemed to have been caused by his wrongful act:—*Held*, that the "person in charge" intended by that section is the master.—Two steamships, the *Q.* and the *R.*, each under the charge of a compulsory pilot, came into collision in the Thames. The *Q.* was solely to blame, and after the collision she rendered no assistance to the *R.*, and shewed no excuse for having failed to do so:—*Held*, that, the mere fact of her having a pilot on board did not exempt her owners from liability.—*Semble*, that, if the collision had been caused solely by the neglect of the pilot on board the *Q.*, the subsequent misconduct of the master in not rendering assistance would not have made her owners liable for the collision. *THE QUEEN. THE LORD JOHN RUSSELL* - - - 354

**PILOTAGE, COMPULSORY:** *See* COMPULSORY PILOTAGE.

**PLEADING**—Answer in collision suit - 265  
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— Costs—Damage caused by pilot - 362  
*See* DAMAGE CAUSED BY PILOT.

— Criminal suit—Bell-ringing - 41  
*See* BELL-RINGING.

— Negligence—Particulars - 346  
*See* PARTICULARS OF NEGLIGENCE.

**PRACTICE**—Bail—Value—Repairs subsequent to arrest - 360  
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**PRIORITY**—Bottomry bond—Wages - 260  
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**PROCTOR'S LIEN**—Costs—Fund in court 1, 314  
*See* GARNISHEE ORDER. 1, 2.

**PROTEST**—Foreign consul—Practice—Foreign ship - - - 44  
*See* SUIT FOR WAGES.

**RELEASE OF CARGO**—*Practice—Freight.*] A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of the arrest a portion only of such cargo remained on board. The vessel and cargo belonged to the same owner:—*Held*, on motion for release of the cargo remaining on board, that the freight due upon the whole cargo must be paid into court, before the portion on board at the time of arrest could be released. *THE ROECLIFF* - - - 363

**REPAIRS AFTER ARREST**—Bail—Amount 360  
*See* AMOUNT OF BAIL.

**REPAIRS OF CHURCH**—*Chancel—Construction—"Church"*—5 *Geo. 4, c. 36, s. 1—Loan by Commissioners of Public Works.*] Section 1 of 5 *Geo. 4, c. 36*, enacts, that churchwardens and overseers of a parish may, with the consent of the vestry, of the bishop of the diocese, and of the incumbent, apply to the commissioners empowered to make advances on public works for a loan for "rebuilding, repairing, enlarging, or otherwise extending the accommodation of any church or chapel of such parish," and the commissioners, on being satisfied that the required consent has been given, may advance the loan which is to be applied "for the purposes mentioned in such application," and rates are to be made for the repayment of the loan.—A loan was made under 5 *Geo. 4, c. 36, s. 1*, for the purpose of repairing the church of *H.* All the formalities required by the Act were duly complied with before the loan was granted. A portion of the money was expended in repairing the chancel, and the rest in repairing the other portions of the church. Subsequently a rate was made in due form to repay the loan.—In a suit against a ratepayer for refusal to pay the rate the defendant alleged in his answer that it was the duty of the rector alone to repair the chancel; that the preliminary resolution of the vestry contemplated the application of a portion of the loan to the repair of the chancel; that a portion of the

**REPAIRS OF CHURCH—continued.**

loan was expended in repairing the chancel; that the consent of the bishop, and the advance by the commissioners, were given and made respectively on the representation that the loan was wanted for purposes that did not include the repair of the chancel; and that, therefore, the rate was void:—*Held*, that the word "church" in the statute included the chancel, and that, therefore, a portion of the loan might properly be expended in repairing the chancel.—*Held*, further, that even if "church" did not include the chancel, yet, as all the required formalities had been observed before the loan was granted, an improper expenditure of the loan could not affect the commissioners' right to repayment: and that the rate, being duly made in form, was valid. *RIPPIN AND WILSON v. BASTIN* - - - - 386

**RIGHT OF CONSIGNEE TO SUE—Bill of Lading**

—*The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6—Passing of Property—Liability for Leakage.* The consignees named in a bill of lading are entitled under s. 6 of the Admiralty Court Act, 1861, to sue for negligence in the carriage of the goods, or for a breach of the contract contained in the bill of lading, although the property in the goods has not passed to them.—A bill of lading for a quantity of sugar contained a memorandum in the margin that the shipowner was "not liable for leakage." The sugar, in consequence of improper stowing, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat:—*Held*, that this was not damage by leakage within the meaning of the memorandum. *THE NEPOTER* - - - 375

**rites**—Book of Common Prayer - - - 116  
See BOOK OF COMMON PRAYER.

**RULES 7, 11 (1867)** - - - - 41  
See BELL-RINGING.

**SALE OF VESSEL ABROAD—Damage—Subsequent Arrest in England—Maritime Lien.**

A collision having occurred between a foreign vessel, the *C. A.*, and an English vessel the *R.*, the master of the *C. A.* admitting his liability, gave, in satisfaction of the damage, a bill of exchange, payable on the arrival of the *C. A.* at S., her port of destination in Scotland. The master of the *C. A.*, however, took her to France, where, her owner becoming bankrupt, she was sold by the assignees of his estate to the defendants, who brought her to England, where she was arrested by the owners of the *R.* in respect of the collision, the bill of exchange never having been paid:—*Held*, that the plaintiffs had not lost their lien for damage by reason of laches, or by the subsequent sale of the vessel. *THE CHARLES AMELIA* - - - - 330

**SALVAGE—Appeal from award of justices—**

"Sum in dispute" - - - - 57  
See APPEAL FROM AWARD OF JUSTICES.

—Bottomry bond—Construction - - - 381  
See BOTTOMRY BOND. 1.

—Collision - - - - 53  
See SALVAGE AFTER COLLISION.

—Contract to give up—Merchant Shipping Act, 1854, s. 182—Merchant Shipping Act, 1862, s. 18 - - - - 370  
See CONTRACT TO GIVE UP SALVAGE.

**SALVAGE—continued.**

—Costs - - - - 345  
See COSTS OF SALVAGE SUIT.

—Master's authority - - - - 365  
See MASTER'S AUTHORITY.

**SALVAGE AFTER COLLISION—25 & 26 Vict. c. 63, s. 33.]** A collision occurred between two vessels, *A.* and *B.* *A.* was in tow of a steam tug; the tug afterwards rendered assistance to *B.* *B.* was found solely to blame for the collision:—*Held*, that the tug's right of salvage remuneration was not affected by 25 & 26 Vict. c. 63, s. 33, which makes it the duty of ships mutually to assist each other after a collision. *THE HANNIBAL. THE QUEEN* 53

**STATUTES:**

5 Geo. 4, c. 36, s. 1 - - - - 386  
See REPAIRS OF CHURCH.

3 & 4 Vict. c. 86. - - - - 281, 335  
See CHURCH DISCIPLINE ACT. 1, 2.

9 & 10 Vict. c. 93 - - - - 325  
See LORD CAMPBELL'S ACT.

13 & 14 Vict. c. 4 - - - - 247  
See TWO CHURCHES IN ONE BENEFICE.

14 & 15 Vict. c. 99, ss. 2, 3 - - - 281  
See CHURCH DISCIPLINE ACT. 1.

17 & 18 Vict. c. 104, s. 182 - - - 370  
See CONTRACT TO GIVE UP SALVAGE.

— s. 191 - - - - 260  
See BOTTOMRY BOND. 3.

— ss. 303, 354 - - - - 102  
See "PAS-ENGERS."

— s. 388 - - - - 97  
See LIABILITY OF SHIPOWNER.

— s. 464 - - - - 57  
See APPEAL FROM AWARD OF JUSTICES.

18 & 19 Vict. c. 111 - - - - 106, 273  
See GENERAL SHIP.

NON-DELIVERY OF CARGO.  
23 & 24 Vict. c. 127, ss. 28, 29, 30 - - 314  
See GARNISHEE ORDER. 1.

24 Vict. c. 10, s. 6 - - - - 103, 273  
See GENERAL SHIP.

NON-DELIVERY OF CARGO.  
— s. 7 - - - - 24, 325  
See "DAMAGE DONE BY SHIP."

LORD CAMPBELL'S ACT.  
— s. 10 - - - - 44  
See SUIT FOR WAGES.

25 & 26 Vict. c. 63 - - - - 345  
See COSTS OF SALVAGE SUIT.

— s. 18 - - - - 370  
See CONTRACT TO GIVE UP SALVAGE.

— s. 33. - - - - 53, 354  
See "PERSON IN CHARGE."

SALVAGE AFTER COLLISION.  
— s. 49 - - - - 57  
See APPEAL FROM AWARD OF JUSTICES.

31 & 32 Vict. c. 71, s. 9 - - - - 345  
See COSTS OF SALVAGE SUIT.

**SUIT FOR WAGES—British Subject against Foreign Ship—Admiralty Court Rules, 1859, Rule 10—24 Vict. c. 10, s. 10—Protest of Foreign Consul**

—*Practice.*] The practice, enjoined by the 10th of the Admiralty Court Rules of 1859, of sending notice of the institution of a suit for wages against



**SUIT FOR WAGES—continued.**

a foreign vessel to the consul of the state to which the vessel belongs, is not affected by the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), though *semble*, that there may be circumstances in which the Court would entertain such a suit without the sanction of the foreign consul. The plaintiff, a British subject, shipped as mate on board a Portuguese vessel, and signed an agreement to be bound by the commercial law of Portugal, which requires that all disputes arising between masters and seamen should be submitted to the arbitration of the Portuguese consul residing in the country where the vessel may be. On the arrival of the vessel in England, the plaintiff arrested her, and instituted a cause of wages and disbursements against the owner in the Admiralty Court. In accordance with the 10th of the Admiralty Court Rules, 1859, notice of the suit was sent to the Portuguese consul in London, whereupon he entered a protest against the proceedings:—On motion by the defendant, the owner of the vessel, the Court decreed that she should be forthwith released, and condemned the plaintiff in costs and damages. **THE NINA** 44

**"SUM IN DISPUTE"** - - - 57

*See* APPEAL FROM AWARD OF JUSTICES.

**TOTAL LOSS—Bottomry bond—Construction** 381

*See* BOTTOMRY BOND. 1.

**TWO CHURCHES IN ONE BENEFICE—Duty of Incumbent.**—13 & 14 Car. 2, c. 4.] It is not competent to a clerk in holy orders, having two churches in one benefice, to perform divine service in one only at his own discretion; it is his duty to perform a service every Sunday in each church. **THE BISHOP OF WINCHESTER v. Rigg** - - - - - 247

**USAGE OF PORT—Non-delivery of cargo** - 273  
*See* NON-DELIVERY OF CARGO.

**VESSEL UNDER WAY—Collision—Vessel with Anchor down, but not held by it—Coloured Lights.**] A vessel with her anchor down, but not actually holden by and under the control of it, is "under way" within the meaning of the Admiralty Regulation (1858), and is bound to exhibit coloured lights. **THE ESK. THE GITANA.** 350

**WAGES—Bottomry bond—Priority** - 260  
*See* BOTTOMRY BOND. 3.

— **British subject and Foreign ship** - 44  
*See* SUIT FOR WAGES.

— **Master's lien** - - - - 65  
*See* MASTER'S LIEN.

**WORDS—"Sum in dispute"** - - - 57  
*See* APPEAL FROM AWARD OF JUSTICES.

END OF VOL. II.

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